



**SALES AND USE TAX
COURT DECISIONS
(1969 to Present)**

TABLE OF COURT DECISIONS

	<i>Page</i>
A	
A & M Records, Inc. v. State Board of Equalization . . . (1988)	1359
A. S. Schulman Electrical Co. v. State Board of Equalization . . . (1975).....	1359
Action Trailer Sales, Inc. v. State Board of Equalization . . . (1975)	1360
Aerospace Corporation v. State Board of Equalization . . . (1990).....	1361
Agnew v. State Board of Equalization . . . (1999)	1361
Agua Caliente Band of Cahuilla Indians v. Hardin . . . (2000).....	1361
Alan Van Vliet Enterprises, Inc. v. State Board of Equalization . . . (1977).....	1362
American Fidelity Fire Insurance Co. v. State Board of Equalization . . . (1973).....	1362
American Hospital Supply Corp. v. State Board of Equalization . . . (1985).....	1362
Artisan Woodworkers (Ward v. Board of Equalization) , In re . . . (2000).....	1362.1
Associated Beverage Co., Inc. v. Board of Equalization . . . (1990).....	1363
Atari, Inc. v. State Board of Equalization . . . (1985)	1363
B	
Bar Master, Inc. v. State Board of Equalization . . . (1976).....	1363
Barnes v. State Board of Equalization . . . (1981).....	1364
Beatrice Co. v. State Board of Equalization . . . (1993).....	1364
Beline Fashions, Inc. v. State Board of Equalization . . . (1976)	1365
Burroughs Corp. v. State Board of Equalization . . . (1984)	1365
C	
C. R. Fedrick, Inc. v. State Board of Equalization . . . (1974).....	1366
C. R. Fedrick, Inc. v. State Board of Equalization . . . (1988).....	1366
Cal-Metal Corp. v. State Board of Equalization . . . (1984).....	1367
Campbell Industries v. State Board of Equalization . . . (1985).....	1367
Canteen Corp. v. State Board of Equalization . . . (1985)	1367
Capitol Records, Inc. v. State Board of Equalization . . . (1984)	1368
Carleton v. State Board of Equalization . . . (1990)	1368
Carlson; California State Board of Equalization v. . . . (1970)	1369
Cedars-Sinai Medical Center v. State Board of Equalization . . . (1984).....	1369
Century Geophysical Corp. v. California Board of Equalization . . . (1977).....	1369
Chahine v. State Board of Equalization . . . (1990).....	1370
Chemed Corp. v. State Board of Equalization . . . (1987)	1370
Chevron U.S.A. Inc. v. State Board of Equalization . . . (1997)	1371
Chula Vista Electric Co. v. State Board of Equalization . . . (1975)	1371
City of Gilroy v. State Board of Equalization . . . (1989).....	1372
City of San Joaquin v. State Board of Equalization . . . (1970).....	1373

COURT DECISIONS (Contd.)

	<i>Page</i>
Coast Elevator Co. v. State Board of Equalization . . . (1975)	1374
Coast Elevator Co. v. State Board of Equalization . . . (1986)	1374
Cod Gas & Oil Co., Inc. v. State Board of Equalization . . . (1997).....	1374
Coleman v. County of Santa Clara . . . (1998)	1375
Continental Water Conditioning Co. v. State Board of Equalization . . . (1989).....	1375
County of Sonoma v. State Board of Equalization . . . (1987)	1376
Cravens v. State Board of Equalization . . . (1997)	1376
Culligan Water Conditioning v. State Board of Equalization . . . (1976).	1377
Current, Inc. v. State Board of Equalization . . . (1994).....	1377
D	
Davis Wire Corp. v. State Board of Equalization . . . (1976)	1378
Debtor Reorganizers, Inc. v. State Board of Equalization . . . (1976)	1378
Delta Air Lines, Inc. v. State Board of Equalization . . . (1989)	1379
Diamond National Corp. v. State Board of Equalization . . . (1976).....	1379
Direct Marketing Ass'n, Inc. v. Bennett . . . (1990)	1380
Duffy v. State Board of Equalization . . . (1984)	1381
E	
Engs Motor Truck Co. v. State Board of Equalization . . . (1987)	1381
F	
Fischbach & Moore, Inc. v. State Board of Equalization . . . (1981)	1382
Framingham Acceptance Corp. v. State Board of Equalization . . . (1987).....	1382
G	
Garg; People v. . . . (1993).....	1383
Garg v. State Board of Equalization . . . (1997)	1383
General Business Systems, Inc. v. State Board of Equalization . . . (1984).....	1383
Good Shepherd Lutheran Home of the West v. State Board of Equalization . . . (1983).....	1384
Gough Industries, Inc. v. Rothman . . . (1971)	1385
H	
Henry's Restaurants of Pomona, Inc. v. State Board of Equalization . . . (1973).....	1385
Hibernia Bank v. State Board of Equalization . . . (1985)	1385
Honeywell, Inc. v. State Board of Equalization . . . (1975)	1386
Honeywell, Inc. v. State Board of Equalization . . . (1975)	1387
Honeywell, Inc. v. State Board of Equalization . . . (1982)	1387
Hoogasian Flowers, Inc. v. State Board of Equalization . . . (1994)	1388
Hotel Del Coronado v. State Board of Equalization . . . (1971).....	1388
Howard Jarvis Taxpayers' Association v. State Board of Equalization . . . (1993).....	1389

COURT DECISIONS (Contd.)

	<i>Page</i>
Howell, In re . . . (1984).....	1389
Huntington Park Redevelopment Agency v. Martin . . . (1985).....	1390
I	
Industrial Asphalt v. State Board of Equalization . . . (1992).....	1390
Institute in Basic Youth Conflicts, Inc. v. State Board of Equalization . . . (1985).....	1391
Intellidata Incorporated v. State Board of Equalization . . . (1983)	1391
International Business Machines v. State Board of Equalization . . . (1980).....	1392
J	
Javor v. State Board of Equalization . . . (1974).....	1392
Javor v. State Board of Equalization . . . (1977).....	1393
Jerron West, Inc. v. California State Board of Equalization . . . (1997)..	1393
Jimmy Swaggart Ministries v. Board of Equalization of California . . . (1990).....	1394
Jordan v. Dept. of Motor Vehicles . . . (1999).....	1395
Jordan et al. v. Department of Motor Vehicles et al. . . . (2002)	1395
K	
Kaiser Steel Corporation v. State Board of Equalization . . . (1979)	1395
King v. State Board of Equalization . . . (1972)	1396
Knudsen Dairy Products Co. v. State Board of Equalization . . . (1970).....	1396.1
Kuykendall v. State Board of Equalization . . . (1994)	1397
L	
L. A. J., Inc. v. State Board of Equalization . . . (1974).....	1397
Ladd v. State Board of Equalization . . . (1973).....	1398
Lockheed Aircraft Corporation v. State Board of Equalization . . . (1978).....	1398
Lykes Bros. Steamship Co., Inc. v. State Board of Equalization . . . (1994).....	1399
Lyon Metal Products, Inc. v. State Board of Equalization . . . (1997)....	1399
M	
Macrodyne Industries, Inc. v. State Board of Equalization . . . (1987)...	1400
Mapo, Inc. v. State Board of Equalization . . . (1975)	1400
McConville v. State Board of Equalization . . . (1978).....	1401
McDonnell Douglas Corporation v. State Board of Equalization . . . (1992).....	1401
MCI Airsignal, Inc. v. State Board of Equalization . . . (1991)	1402
Mercedes-Benz of North America, Inc. v. State Board of Equalization . . . (1982).....	1402
Mission Pak Co. v. State Board of Equalization . . . (1972)	1403

COURT DECISIONS (Contd.)

	<i>Page</i>
Modern Paint & Body Supply, Inc. v. State Board of Equalization . . . (2001).....	1403
Monterey Peninsula Taxpayers Association v. County of Monterey . . . (1992).....	1403
Montgomery Elevator Co. v. State Board of Equalization . . . (1981) ...	1404
Montgomery Ward & Co. v. State Board of Equalization . . . (1969)....	1405
N	
National Aircraft Leasing, Ltd. v. State Board of Equalization . . . (1979).....	1405
National Geographic Society v. State Board of Equalization . . . (1977).....	1406
National Railroad Passenger Corp. v. California State Board of Equalization . . . (1986).....	1407
Navistar Internat. Transportation Corp. v. State Board of Equalization . . . (1994).....	1407
Newco Leasing, Inc., et al. v. State Board of Equalization . . . (1983)...	1408
Northrop Corporation v. State Board of Equalization . . . (1980).....	1408
O	
Occidental Life Insurance Co. v. State Board of Equalization . . . (1982).....	1408
Oliver and Williams Elevator Corp. v. State Board of Equalization . . . (1975).....	1409
Ontario Community Foundation, Inc., et al. v. State Board of Equalization . . . (1984).....	1409
Overhead Electric Co. v. State Board of Equalization . . . (1991).....	1410
Owens-Corning Fiberglas Corp. v. State Board of Equalization . . . (1974).....	1410
P	
Pacific Employers Ins. Co.; People v. . . . (1973).....	1411
Pacific Southwest Airlines v. State Board of Equalization . . . (1977)	1411
Paine v. State Board of Equalization . . . (1982).....	1412
Parfums-Corday, Inc. v. State Board of Equalization . . . (1986)	1412
Philips and Ober Electric Co. v. State Board of Equalization . . . (1991).....	1413
Pope v. State Board of Equalization . . . (1988)	1413
Preston v. State Board of Equalization . . . (2001).....	1414
Purdue Frederick Co. v. State Board of Equalization . . . (1990).....	1414
Q	
R	
Redding Ford v. State Board of Equalization . . . (1983)	1415
Redwood Empire Publishing Co. v. State Board of Equalization . . . (1989).....	1415

COURT DECISIONS (Contd.)

	<i>Page</i>
Renovizor's, Inc., In re . . . (2002)	1416
Richard Boyd Industries, Inc. v. State Board of Equalization . . . (2001).....	1416
Rider v. County of San Diego . . . (1991)	1416.1
Riley B's, Inc. v. State Board of Equalization . . . (1976)	1416.1
S	
Santa Barbara Optical Co., Inc. v. State Board of Equalization . . . (1975).....	1416.2
Santa Fe Energy Co. v. State Board of Equalization . . . (1984).....	1416.2
Satco, Inc. v. State Board of Equalization . . . (1983).....	1416.2
Sav-On Drugs, Inc. v. Superior Court . . . (1975).....	1417
Schnyder et al. v. State Board of Equalization . . . (2002).....	1418
Scholastic Book Clubs, Inc. v. State Board of Equalization . . . (1989) .	1418
Sierra Summit, Inc.; California State Board of Equalization v. . . . (1989)	1419
Simplicity Pattern Co. v. State Board of Equalization . . . (1980).....	1420
Sluggo's Chicago Style, Inc., In re . . . (1990).....	1420
Snoozie Shavings, Inc. v. State Board of Equalization . . . (1979).....	1420
Southern California Edison Co. v. State Board of Equalization . . . (1972).....	1421
Southern Pacific Equipment Co. v. State Board of Equalization . . . (1971).....	1421
Sperry & Hutchinson Co.; Botney v. . . . (1976)	1422
Sprint Communications Co. v. State Board of Equalization . . . (1995) .	1422
Standard Engineering Corp.; Wright v. . . . (1972).....	1423
Standard Oil Co. of California v. State Board of Equalization . . . (1974).....	1424
Sternoff v. State Board of Equalization . . . (1980).....	1425
Stewart v. State of California . . . (1969)	1425
Stockton Kenworth, Inc. v. State Board of Equalization . . . (1984).....	1426
Sunshine Art Studios of California v. State Board of Equalization . . . (1974).....	1426
Superior Court (Associated Sales Tax Consultants); State Board of Equalization v. . . . (1992)	1427
Superior Court (O'Hara & Kendall Aviation, Inc.); State Board of Equalization v. . . . (1985)	1427
Superior Court (Petroleum Contractors, Inc.) v. State Board of Equalization . . . (1980).....	1428
Szabo Food Service, Inc. of California v. State Board of Equalization . . . (1975).....	1428

COURT DECISIONS (Contd.)

Page

T

Tetra Pak, Inc. v. State Board of Equalization . . . (1991)	1429
Tobi Transport, Inc. v. State Board of Equalization . . . (1980)	1429
Touche Ross & Co. v. State Board of Equalization . . . (1988)	1430

U

Union Oil Co. v. State Board of Equalization . . . (1990).....	1430
United States v. California . . . (1993).....	1431
United States v. California State Board of Equalization . . . (1981)	1431
United States v. California State Board of Equalization . . . (1982)	1432
United States v. State Board of Equalization . . . (1976).....	1432
United States v. State Board of Equalization . . . (1980).....	1432
United States Fire Insurance Co.; People v. . . . (1976)	1433
United States Lines, Inc. v. State Board of Equalization . . . (1986).....	1434

V

V.O. Motors v. State Board of Equalization . . . (1982)	1434
---	------

W

Wallace Berrie & Co. v. State Board of Equalization . . . (1985).....	1434
Western Concrete Structures, Inc. v. State Board of Equalization . . . (1977).....	1435
Western Contracting Corp. v. State Board of Equalization . . . (1974)....	1436
Wilkinson v. Wilkinson . . . (1976).....	1436
Wirick v. State Board of Equalization . . . (2001).....	1436
Woo v. State Board of Equalization . . . (2000).....	1436.1
Woosley v. State of California . . . (1992).....	1437

X

Y

Yamaha Corp. of America v. State Board of Equalization . . . (1998)....	1438
Yamaha Corp. of America v. State Board of Equalization . . . (1999)....	1438

Z

A

Sales of Master Tapes and Records are Not Exempt Services of Artists

Taxpayer, a record company, purchased master tapes and records from recording artists outside of California and used the masters to produce copies of the recordings. Taxpayer also made duplicate masters and leased them to record clubs to produce copies. Taxpayer contended that: (a) its contracts with recording artists were service contracts, not sales; (b) it was entitled to produce evidence at trial that some masters were never used in California; and (c) the duplicate masters were exempt from tax because they were leased in the same form as acquired.

The court of appeal held in favor of the Board, finding that the true object of the contracts with the recording artists was for the production of the master tapes and records, not for the services of the artists. The court also held that the trial court properly refused to allow the taxpayer to introduce evidence that some masters had never been used in California, since the taxpayer had not raised that issue in its claim before the Board. The court further held that the duplicate masters and original masters were different items of tangible property, and taxpayer could not lease the duplicates tax-free as leases of property in the same form as acquired, since it produced the duplicates from the original masters. *A & M Records, Inc. v. State Board of Equalization* (1988) 204 Cal.App.3d 358.

Assembly of Electrical Power Transmission and Distribution Facilities Not Taxable Fabrication Labor

Prior to 1965, plaintiff assembled and erected steel towers for a public utility from components furnished by the utility, and also erected wooden poles furnished by the utility. Section 6016.5, effective September 17, 1965, declared that for purposes of sales and use tax law, “tangible personal property” does not include telephone and telegraph lines, electrical transmission and distribution lines, and the poles, towers, or conduits by which they are supported. Prior to that date the Board had considered such items as tangible personal property for sales and use tax purposes. In this case the Board contended that plaintiff provided labor for the fabrication of tangible personal property and that charges for this labor were subject to sales tax. The court overruled the Board, holding that plaintiff was a construction contractor constructing structures on land, and the structures, because of their relatively permanent nature, constituted realty rather than tangible personal property. *A. S. Schulman Electrical Co. v. State Board of Equalization* (1975) 49 Cal.App.3d 180.

Regulation 1660(c)(2) Upheld

Plaintiff was a lessor of mobile office trailers whose usual practice was to pay sales tax reimbursement on the purchase price of the trailers and then to lease the trailers tax-free as permitted by Section 6006(g)(5) of the Revenue

and Taxation Code. Plaintiff, however, failed to pay tax or tax reimbursement on the purchase of 100 of its trailers and also failed to collect use tax on these trailers based on the lease payments. When this was discovered during audit, plaintiff offered to pay tax computed on the purchase price together with interest and penalties due, but the Board determined in accordance with Regulation 1660(c)(2) that plaintiff, having failed to pay tax or tax reimbursement at the time the trailers were first placed in lease service, was required to pay an amount equal to the use taxes that should have been collected with the lease payments.

Plaintiff paid and sued for refund on the basis that the provision in the Board's Regulation 1660(c)(2) was not authorized by the statute and that plaintiff should be permitted to pay tax measured by purchase price. The court of appeal upheld the Board, finding that the Board's construction of the statute as expressed in the regulation is implicit in and required by the statute and that the propriety of the interpretation was indicated by the failure of the Legislature to dictate a contrary interpretation in any of the five amendments to the statute enacted after the adoption of the Board's regulation. *Action Trailer Sales, Inc. v. State Board of Equalization* (1975) 54 Cal.App.3d 125.

Tax does Not Apply to Overhead Materials Purchased by Aerospace Company Pursuant to Contract with Federal Government

The Board assessed sales and use taxes against taxpayer, an aerospace company, on supplies and materials taxpayer obtained to perform a contract with the United States for research and development of space and military systems. For accounting and billing purposes, taxpayer charged materials to "indirect costs" included in "overhead", and allocated the overhead materials to specific contracts by multiple accounting methods. Taxpayer purchased the items pursuant to resale certificates given to the vendors, and no sales tax was paid at the time of purchase. Taxpayer's contract with the federal government contained a clause specifying when title to the overhead materials passed to the federal government. Based on an interpretation of a Board-issued general bulletin, and, later, a revision of Regulation 1618, the Board determined that taxpayer was liable for tax on the purchase of certain categories of overhead materials. Regulation 1618 requires proof of allocation of overhead material to a specific contract in order for title to such materials to vest in the government. Taxpayer asserted that the Board's interpretation was improper and that Regulation 1618 was invalid.

The court found Regulation 1618 to be arbitrary and in conflict with the court's holding in *Lockheed Aircraft Corp. v. State Board of Equalization* (1978) 81 Cal.App.3d 257, that title to property acquired for the performance of a contract with the federal government vests in the government in accordance with the title provisions of the contract. While Regulation 1618 states that title passes to the federal government in accordance with the terms of the contract, other provisions of the regulation ignore the contract. The

court concluded that taxpayer's resale of overhead materials to the federal government pursuant to the contracts was exempt from sales tax under Revenue and Taxation Code Section 6381. Further, since taxpayer's use of the materials occurred after title passed to the government under the title clauses in the contracts, such use was exempt from use tax. *Aerospace Corporation v. State Board of Equalization* (1990) 218 Cal.App.3d 1300.

Interest Due is not Part of the Tax

Plaintiff paid the tax assessed but did not pay the accrued interest, and filed a claim for refund. The Board denied the claim because the full amount of tax and interest had not been paid, and plaintiff then filed a suit for refund. The California Supreme Court concluded that the interest which had accrued on the delinquent tax was not part of the tax within the meaning of California Constitution Article XIII, Section 32, or Revenue and Taxation Code section 6931, so that payment of accrued interest on the tax deficiency was not a prerequisite to either an administrative claim for refund or a subsequent court action for refund of taxes. *Agnew v. State Board of Equalization* (1999) 21 Cal.4th 310.

Eleventh Amendment Does Not Bar Federal Suit by Indian Tribe

An Indian Tribe operated a hotel on tribal property. It did not report and pay use tax with respect to its sales of tangible personal property to non-tribal purchasers. The Board issued an assessment for that tax and advised the Tribe that if it failed to pay the assessment within one month, the Tribe's alcoholic beverage license would be suspended. The Tribe filed suit in federal court for declaratory relief. The Board contended that the action was barred by the State's Eleventh Amendment sovereign immunity, but the court held that the Tribe's action in federal court was permitted under the doctrine of *Ex Parte Young*. *Agua Caliente Band of Cahuilla Indians v. Hardin* (9th Cir. 2000) 223 F.3d 1041.

Sales of Foreign Coins of \$1,000 or More are Bulk Sales and Exempt from Tax

The Board, in accordance with Sales and Use Tax Regulation 1599, had asserted tax on the sale of foreign coins on the basis that Section 6355 of the Revenue and Taxation Code exempted from tax as "bulk" sales only those sales in which the face value of the coins was \$1,000 or more in United States money at the existing rate of exchange for currency, whether made of paper or metal. Section 6355 provides that a "bulk" sale shall be deemed to have occurred if the amount of coins sold in the transaction totals, in face amount, the sum of \$1,000 or more, or its equivalent. The court of appeal upheld the trial court in finding portions of the regulation void because they constituted too narrow an interpretation of the statute. Where the market value of the foreign coins amounts to \$1,000 or more in United States money, the

transaction must be considered an exempt bulk sale. *Alan Van Vliet Enterprises, Inc. v. State Board of Equalization* (1977) 65 Cal.App.3d 964.

Duplicate Notice to Surety Not Required

Plaintiff, an insurance company acting as surety for persons required to post security for payment of sales and use taxes, sought a refund of certain penalties paid by it on its bonds. Plaintiff contended that it was entitled to duplicate notice of tax determinations issued against its principals, so that it could make payment of the tax before the determinations became final and penalties were added thereto. The court, in affirming the judgment of the trial court, held that there is no constitutional compulsion for the state to give a duplicate notice to the surety; notice to the taxpayer is sufficient. Nor was this a situation requiring notice to the surety under Civil Code Section 2808, because the surety could have acquired notice of default from its principal through the exercise of due diligence. Lastly, the court held that when the Board requires Section 6701 bonds to be written so as to include the payment of penalty assessments in addition to principal and interest, the Board is not in violation of Civil Code Section 2773. Civil Code Section 2773 prohibits agreements to indemnify wrongdoers. The indemnity here was for the benefit of the State under a reasonable procedure to secure payment of revenue. *American Fidelity Fire Insurance Co. v. State Board of Equalization* (1973) 34 Cal.App.3d 51.

Purchases of Menus by Hospital does not Qualify for Food Exemption

The Court of Appeal held that an administrative rule by the Board of Equalization that menus purchased for use in a hospital's dietary department do not qualify for the sales tax exemption for food products was valid and applied to the action, instituted five years after enactment of the rule. The court further held that the ruling was not an administrative interpretation in conflict with the legislative intent behind Revenue and Taxation Code section 6363.6. *American Hospital Supply Corp. v. State Board of Equalization* (1985) 169 Cal.App.3d 1088 [disapproved in part in *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1)].

Interest on Nondischargeable Tax Debts

The Board filed a claim for the principal amount of tax and pre-petition interest in debtor's Chapter 11 bankruptcy. The claim also included post-confirmation interest, but did not include post-petition, pre-confirmation interest and penalties. The debtor satisfied the requirements of his confirmed reorganization plan, which did not include the post-petition, pre-confirmation interest and penalties. The Board issued an assessment for such amounts, and thereafter recorded a lien against the debtor who initiated an adversary proceeding challenging the Board's assessment and collection efforts. The debtor was personally liable for the tax debt because it was excepted from discharge by 11 U.S.C. section 523(a)(1)(A). The court held

that post-petition interest on a tax debt excepted from discharge is also excepted from discharge and is recoverable against the debtor personally and thus upheld the Board's assessment. *In re Artisan Woodworkers (Ward v. Board of Equalization)* (9th Cir. 2000) 204 F.3d 888.

Manufacturer Held to be Retailer of Soft Drinks Sold through Vending Machines; Purchase of Reusable Bottles Subject to Use Tax

Taxpayer, which manufactured and sold soft drinks to vending machine owners and lessees who had a fixed place of business, challenged the Board's application of Regulation 1574 to the sale of soft drinks from the vending machines. Regulation 1574 provides that a person who sells tangible personal property to vending machine operators and does not notify the Board of the name and address of each operator and who fails to furnish a valid resale certificate will be regarded as the retailer of the property sold through the vending machines, and thus will be required to pay tax on such retail sales. Revenue and Taxation Code Section 6015 permits the Board, when necessary for the efficient administration of sales and use tax law, to regard dealers, distributors, supervisors, or employers as retailers.

The court of appeal held in favor of the Board, finding that Regulation 1574 was valid, and was validly applied to the sales of soft drinks from the vending machines. The court found that the treatment of vending machine sales on a classwide basis was justified, and that there was sufficient evidence that administrative efficiency necessitated Regulation 1574. In addition, the court found that the regulation was not unduly burdensome, and that the application of the regulation to taxpayer was not inconsistent with the definition of "retailer" in Section 6015.

Taxpayer also argued that its purchase of reusable bottles was not subject to the use tax, since it resold the bottles to its customers, and neither the initial filling of new bottles nor the refilling of returned, reusable bottles constituted

1362.2
2002-1

SALES AND USE TAX COURT DECISIONS

an intervening non-sales use. The court disagreed. The reusable bottles were returned to taxpayer more than 50 percent of the time; were, on average, reused four times; and bore taxpayer's franchised trademark, as well as the words "return for deposit." Assuming that taxpayer correctly characterized the transaction as a sale of returnable bottles, the court found that the use tax was still due, since taxpayer's primary purpose in purchasing the returnable bottles was not to resell them, but to fill them with the product in preparation for selling it. Finally, the court found that returnable bottles did not fall within the exemption provided for specified containers in Revenue and Taxation Code Section 6364(c). *Associated Beverage Company, Inc. v. Board of Equalization* (1990) 224 Cal.App.3d 192.

Purchase of Catalogs for Advertising not Exempt as Marketing Aids

Taxpayer purchased catalogs to include in each video game system and cartridge sold to customers. These catalogs described taxpayer's other video game cartridges available for purchase. The Board assessed use tax on the purchase prices of the catalogs. Taxpayer argued that it purchased the catalogs for resale as marketing aids under Regulation 1670(c). The Court of Appeal held that taxpayer was barred from contending the catalogs were purchased for resale when that issue was not raised in taxpayer's claim for refund. The court also held that the evidence supported the trial court's finding that the catalogs were advertisements for taxpayer's own use and benefit, and were not sold with the cartridges as marketing aids. Accordingly, the court held in favor of the Board. *Atari, Inc. v. State Board of Equalization* (1985) 170 Cal.App.3d 665.

B

Furnishing of Beverage Dispensing Units is Lease Rather than Service

Plaintiff sued for refund of taxes paid to the Board which were based on charges to users of plaintiff's equipment and services. Plaintiff manufactured beverage dispensing units used by bartenders and others to dispense mixed drink ingredients at bars and similar business places. The contracts between plaintiff and individual users called for plaintiff to install the dispensers and to provide maintenance and repair service throughout the life of the agreement. A flat monthly charge was made to each user for the use of the dispenser and for the maintenance and repair service, regardless of the amount of service actually required. Plaintiff claimed that the charge was for services and was thus exempt from tax.

The court of appeal, relying on *Culligan Water Conditioning v. State Board of Equalization* (1976) 17 Cal.3d 86, reversed the trial court and upheld the Board in finding that to plaintiff's customers, the true object of the contract was to obtain the use of the dispenser. The contract, regardless of the wording, was therefore a contract for the lease of tangible personal property, rather than a contract for services, and the receipts were subject to tax. *Bar Master, Inc. v. State Board of Equalization* (1976) 65 Cal.App.3d 408.

Failure to Exhaust Administrative Remedies is Jurisdictional Bar

Plaintiff filed a complaint for declaratory relief and a refund of sales and use tax, alleging he had erroneously overpaid such taxes and had filed a claim for refund, which had been denied, with the State Board of Equalization. Plaintiff also alleged that certain statutes and regulations were unconstitutional in that they imposed sales and use taxes discriminating against the United States and contractors, including plaintiff, who dealt with the United States. The Board moved for summary judgment on the ground that plaintiff had failed to allege facts constituting a cause of action and had failed to exhaust its administrative remedies. The trial court granted the motion.

The court of appeal affirmed. The court held plaintiff failed to exhaust its administrative remedies and had refused to present factual documentation of its claim for tax refund to the Board so that it could render a decision on the merits of plaintiff's claim. The failure to exhaust the administrative remedy available to plaintiff was a jurisdictional bar to court proceedings, so no issues of fact could be decided by the trial court. The court held that under these circumstances it was not incumbent on the trial court to rule on any of plaintiff's allegations involving the invalidity of any statutes relating to sales or use taxes or any administrative regulations relating thereto, under either state or federal law. *Barnes v. State Board of Equalization* (1981) 118 Cal.App.3d 994.

Assumption of Liabilities Constitutes Consideration

Plaintiff corporation created a subsidiary and transferred to it all the assets of one of plaintiff's divisions. In exchange for those assets, the subsidiary issued 9,000 shares of the subsidiary's stock to plaintiff and assumed substantially all of the liabilities of the former division.

The Supreme Court held that even if the plaintiff remained primarily and jointly liable for debts and obligations assumed by its subsidiary, the assumption of liabilities by the subsidiary was consideration as between the transferor (the plaintiff) and the transferee (the subsidiary). Since the transfer was for consideration, it was a sale subject to sales tax. *Beatrice Co. v. State Board of Equalization* (1993) 6 Cal.4th 767.

Tax Applies to Separately Stated Transportation Charges if Transportation is Not from Retailer's Place of Business Directly to the Purchaser

Plaintiff sold women's apparel through "home fashion parties" where an agent of plaintiff solicited orders for merchandise. The parties were held at the homes of "hostesses" recruited by the agent. The hostesses received merchandise awards based on sales. A standard delivery charge was added to each order. The hostesses collected for the orders and delivered the merchandise to the individual purchasers. All orders from a single party were

sent by plaintiff to the hostess of that party. Section 6011 of the Revenue and Taxation Code permits retailers to exclude from the taxable sales price separately stated charges for shipment from the retailer's place of business directly to the purchaser.

Plaintiff was assessed tax on the delivery charges on the basis that delivery was not directly to the purchaser as required by the statute. Plaintiff paid the tax and sued for refund, contending that delivery was directly to a place specified by the purchaser as required by the Board's Ruling No. 58, then in effect. The court of appeal affirmed the trial court in finding that the hostesses were paid representatives of plaintiff and that the shipments could not therefore be said to be deliveries directly to the purchaser within the meaning of the statute, nor directly to a place designated by the purchaser within the meaning of the Board's regulation. *Beline Fashions, Inc. v. State Board of Equalization* (1976) 56 Cal.App.3d 389.

Taxpayer has Burden of Proving that Primary Purpose of Purchase is Nontaxable

Plaintiff Burroughs Corp. manufactured certain computer components ("captive" components) and used them in testing other newly manufactured computer equipment. Burroughs later refurbished the captive components, sold or leased them at full value, and paid or collected sales or use tax on the sale and leases. The Board also imposed use taxes on Burroughs' purchases of the materials from which the captive components were manufactured. In Burroughs' action for refund of the use taxes paid, the trial court granted judgment in favor of the Board.

The court of appeal affirmed, holding that the "primary purpose" test applies. If Burroughs' primary purpose in manufacturing the captive components is to test other components, this is a taxable use. If the primary purpose is to prepare the captive components for resale, this is an exempt use.

Burroughs did not carry its burden of proving that its primary purpose in purchasing the materials used to manufacture the captive components is to sell or lease the components. Neither the manufacturing objective (testing) nor the marketing objective (resale) is the one primary purpose. Use tax therefore applies to the purchase of the materials, even though tax also later applies to the sales or leases of the components. *Burroughs Corp. v. State Board of Equalization* (1984) 153 Cal.App.3d 1152.

C

Classification of Property Used in Contracts with the United States Government

Plaintiff was a subcontractor to the prime contractor, the United States Corps of Engineers, under contract to furnish and install certain alterations and improvements of airfields and air navigation equipment at California airfields. Tax was imposed on plaintiff under Revenue and Taxation Code

sections 6094, 6202, and 6384 for its use of various items of tangible personal property in the performance of its contract to improve real property for United States Government.

The Court of Appeal held that California had the constitutional power to impose sales and use taxes on contractors in relation to work performed at federal facilities located in California because Congress had expressly consented to such tax and had thereby waived the sovereign immunity of the United States. The court found that while California had generally exempted from the sales tax gross receipts from the sale of tangible personal property to the United States, the state taxed tangible personal property “for use in the performance of contracts with the United States for the construction of improvements on or to real property in this state.” (Rev. & Tax. Code §§ 6381, 6384.) *C. R. Fedrick, Inc. v. State Board of Equalization* (1974) 37 Cal.App.3d 564.

Pipes, Tank Settings, and Compressors were Taxable Materials and Fixtures when Installed on U.S. Government Property

Taxpayer purchased pipes, tank settings, and compressor facilities and installed them as part of a gas transmission facility on U.S. Government property. Taxpayer contended the items were exempt sales of machinery and equipment to the U.S. Government. The Board contended the items were improvements to realty, and that the contract was a construction contract under Sales and Use Tax Regulation 1521.

The court of appeal held in favor of the Board, finding that the items were materials and fixtures, and that the Board correctly regarded the contractor as the consumer when it performed a construction project for the U.S. Government. The manner of attachment of the items was that used for fixtures, the facilities constructed were adapted to the use of the realty, and the probability of frequent relocation was low. *C. R. Fedrick, Inc. v. State Board of Equalization* (1988) 204 Cal.App.3d 252.

Transfer of Equipment to Commencing Partnership in Exchange for Assumption of Indebtedness is a Taxable Sale

Appellant transferred equipment to a commencing partnership as a capital contribution, and in return the partnership assumed appellants’ liabilities for indebtedness on the equipment. The Board determined that the transaction constituted a taxable sale, and the amount of the sale subject to tax was the full amount of the debt assumed by the partnership. Appellant brought suit for refund, and the trial court granted judgment for the Board.

The court of appeal affirmed. It held that the transaction was a sale because appellant transferred its right, title, and interest in the property to a separate legal entity. The court further held that the Board properly measured the tax by the full amount of the indebtedness assumed by the partnership, because this constituted a valuable consideration received by appellant. Appellant,

having elected the benefits of the partnership form of doing business, cannot ignore the disadvantages resulting from its election. *Cal-Metal Corp. v. State Board of Equalization* (1984) 161 Cal.App.3d 759.

Ferry Boats Principally used in Intrastate Transportation Are Not Tax Exempt

Taxpayer sold three ferry boats to be used for passenger service between Marin County and San Francisco. A survey determined that the ferry boats carried at least one passenger using the ferry service as a part of interstate travel on less than one percent of the voyages. The Board assessed sales tax on the sales of the ferry boats. Taxpayer sued for refund of the taxes paid.

The Court of Appeal held that in order to qualify for the tax exemption provided by Revenue and Taxation Code section 6368, taxpayer had the burden of showing that the ferry boats were principally used in the interstate transportation of passengers for hire. Also, the Board's long-standing administrative interpretation, extending the principal use standard to watercraft expressly described in Sales and Use Tax Regulation 1594(a)(1) (tugboats and ferry boats), was entitled to particular consideration, and refuted taxpayer's argument that a more relaxed rule applies to those watercraft. *Campbell Industries v. State Board of Equalization* (1985) 167 Cal.App.3d 863.

Vending Machine Operator Entitled to Nonreturnable Container Exemption

Taxpayer purchased nonreturnable paper cups and used the cups to hold the drinks dispensed through its vending machines. The Board contended that the taxpayer was liable for use tax on its purchases of the cups under Revenue and Taxation Code Section 6359.4, making vending machine operators consumers of tangible property sold through the vending machines for 15¢ or less. The taxpayer contended that it was nevertheless entitled to the tax exemption provided by Revenue and Taxation Code Section 6364(a) for its purchases of nonreturnable containers which it filled and resold along with the contents, even though its sales of the contents and the containers were nontaxable sales through vending machines. The trial court entered judgment in favor of the taxpayer.

The Court of Appeal, Second District, affirmed. The court held that the two sections were not irreconcilable with each other, that the taxpayer was entitled to the nonreturnable container exemption, and that the Board's Regulation 1574, which provided that vending machine operators were consumers of nonreturnable containers dispensed through the machines, was invalid as being in conflict with the statutory nonreturnable container exemption. *Canteen Corp. v. State Board of Equalization* (1985) 174 Cal.App.3d 952.

Master Sound Tapes were Properly Taxable Prior to 1975 Legislation

Prior to 1975, taxpayer purchased original and duplicate master sound tapes made by other production companies, paid royalties and production costs to independent production companies to acquire master tapes, and furnished duplicate master tapes to other production companies under license agreements. The Board imposed sales and use taxes on these transactions, and taxpayer filed suit for refund. The trial court granted judgment in favor of the Board.

The court of appeal affirmed. The court held that: 1975 legislation exempting sales and purchases of master sound tapes (Revenue and Taxation Code section 6362.5) was not made retroactive to periods before 1975 by virtue of 1982 legislation amending Section 6362.5 and declaring the amendment to be declaratory of existing law; agreements between taxpayer and independent production companies were sales contracts and not employment contracts; master tapes were properly taxed as tangible personal property physically useful in the manufacturing process and not furnished as incidents to the services of the recording artists; taxpayer was not denied equal protection on the grounds that leases of motion pictures were exempt from tax while purchases of master sound tapes were taxed; and taxpayer's licenses of duplicate master tapes to other production companies together with the right to reproduce the musical recordings were taxable leases, not payments for intangible rights. *Capitol Records, Inc. v. State Board of Equalization* (1984) 158 Cal.App.3d 582.

Guaranty for Past-Due Taxes Enforced Despite Changes

A surety guaranteed the tax liability of taxpayer. During an audit, taxpayer signed a waiver extending the time in which the Board might issue a delinquency determination. The surety argued that the waiver exonerated him from liability under Civil Code Section 2819, which provides that a surety is exonerated if the terms of the principal's obligation to the creditor are altered in any material way without the surety's consent.

The court of appeal allowed the Board to recover on the guaranty. The court agreed that the waiver was a material change in taxpayer's obligation, but held that the surety had consented to the change by accepting the following language in the Board's standard guarantee form: "the surety's liability shall be coextensive with that of the taxpayer and no change in the law or extensions, waivers or modifications in the liability between the taxpayer and the State Board of Equalization shall relieve the surety of his obligation herein." *State Board of Equalization v. Carleton* (1990) 223 Cal.App.3d 1607.

Lien for Discharged Taxes Not Enforceable Against Assets Acquired Following Filing of Petition in Bankruptcy

At the time of filing his petition in bankruptcy, taxpayer was indebted to the Board of Equalization for a sales and use tax liability which arose more than three years prior to the filing of the petition. That liability was then secured by liens which had been recorded by the board.

The U. S. Court of Appeals held that Section 17a(1) of the Bankruptcy Act, 11 U.S.C. §35(a), did not preserve a pre-bankruptcy tax lien as to assets acquired after bankruptcy. *California State Board of Equalization v. Carlson* (9th Cir. 1970) 423 F.2d 714, cert. den. (1970) 400 U.S. 819.

Financing Transactions Did Not Result in Taxable Sales and Leasebacks of Equipment

Taxpayer purchased medical equipment from vendors in taxable sales and placed the equipment in use. Before the equipment was fully paid for, taxpayer obtained alternative financing for the equipment by transferring title to the equipment and leasing it back from leasing companies in return for monthly payments. The leasing companies reimbursed taxpayer for the amounts it had already paid to the vendors and paid the balance of the purchase prices to the vendors. The Board imposed use tax on the lease payments, and taxpayer filed suit for refund.

The Court of Appeal held that only one sale of the equipment (from the vendors to taxpayer) had occurred, and that the object of the transactions between taxpayer and the leasing companies was to obtain financing for the purchase of the equipment, not to make taxable sales and leasebacks. Despite taxpayer's transfer of title, it remained the owner of the equipment, and no taxable sale or lease occurred under the Uniform Commercial Code and the Sales and Use Tax Law. *Cedars-Sinai Medical Center v. State Board of Equalization* (1984) 162 Cal.App.3d 1182.

Effect of Order of Bankruptcy Court

The Board of Equalization filed a claim in bankruptcy against a parent corporation, under Revenue and Taxation Code section 6812 (successor liability), for tax allegedly due from parent's wholly owned subsidiary. The bankruptcy referee disallowed the claim in its entirety on the ground that it described a debt which was not a debt of the bankrupt parent corporation. The Board failed to appeal the order disallowing its claim.

Since the Board failed to appeal the order below, the matter was considered by the Court of Appeals as one where the seller had no tax liability. (If the Board had wished to contest that finding, it should have appealed it.) Accordingly, since the seller had no tax liability, the purchaser could not have liability under the successor liability provisions which apply only when the seller does have a tax liability. *Century Geophysical Corp. v. California Board of Equalization* (9th Cir. 1977) 564 F.2d 342.

Claim for Refund of Partial Payment of Periodic Tax Liability Must be Filed within Six Months of Date of Partial Payment

The Board issued notices of determination to taxpayer, assessing additional taxes due concerning the taxpayer's sale of mobile homes. After the assessments became final, taxpayer made several partial payments and filed a claim for refund of seven installments he had paid over the preceding fourteen years. The court of appeal upheld the Board's position that Revenue and Taxation Code Section 6902 requires a taxpayer who seeks a refund of taxes he or she has paid in partial satisfaction of a periodic tax liability to petition for refund thereof within six months from the date of such partial payment. The court rejected the taxpayer's contention that the time limit for pursuing the administrative remedy which must be exhausted prior to filing suit should not begin until a tax liability is fully paid. The result of such a construction would be to provide no time limit for the recovery of amounts paid as long as some portion of a periodic liability was left unsatisfied, frustrating the public policy enforcing prompt payment of public tax revenue. *Chahine v. State Board of Equalization* (1990) 222 Cal.App.3d 485.

The Sale of Service Division Assets is Not an Occasional Sale if it is One of a Series of Sales

Plaintiff had three divisions that made sales requiring a seller's permit, and one medical testing services division that conducted activities which did not require a permit. Plaintiff sold all the assets of the service division in a single transaction and contended the sale was an exempt occasional sale since that service division was autonomous from the other retail divisions.

The Board assessed tax on the grounds that the sale of the service division's assets was one of a series of sales by plaintiff.

The court of appeal held in favor of the Board. It held that the Board was not required to consider only sales of equipment used in the service division in determining whether the taxpayer had made a series of sales requiring a permit. The language of the Revenue and Taxation Code defining an occasional sale provided no basis on which to segregate that sale of assets from like sales of other property used in other regions of that division or in other divisions. *Chemed Corp. v. State Board of Equalization* (1987) 192 Cal.App.3d 967.

Completion of Manufacture and Sale by Second Retailer

A purchaser contracted with a company to manufacture and deliver an oil platform to an offshore location outside California. The original contractor began constructing the platform at a California site but did not complete construction due to a dispute with the purchaser. Nevertheless, the contractor's employees continued working under an interim agreement. A second contractor then finished building the platform at the same site and, delivered it to the offshore location by common carrier.

The Board assessed tax against the original contractor for its partial completion of the platform, reasoning that the purchaser had taken delivery of the partially completed platform upon termination of the original contract. The court held, however, that under the particular facts of this case, the change in contractors prior to the completion of the full contract did not constitute 'delivery' of the platform to the purchaser. Thus, the sale remained an exempt sale in interstate commerce. *Chevron U.S.A. Inc. v. State Board of Equalization* (1997) 53 Cal.App.4th 289.

Tax Applies to Purchase Price of Materials Used in the Installation of an Electric Transmission Line on Real Property Owned and Occupied by the United States

Plaintiff contracted with the United States to replace electrical transmission cable on real property owned and occupied by the United States. The Board asserted and collected use tax based on the purchase price of the cable, and plaintiff sued for a refund. Plaintiff claimed that no tax was due because the cable was machinery and equipment exempt from tax under Section 6381 of the Revenue and Taxation Code as personal property sold to the United States. Plaintiff further claimed that if the cable was not machinery and equipment, it was not tangible personal property covered by the Sales and Use Tax Law because it was an electrical transmission line excluded from the definition of tangible personal property by Section 6016.5 of the Code.

The trial court denied plaintiff's claim, and the court of appeal affirmed. The court held that the electrical transmission line as a whole was a structure which was part of the real property and the cable was a fixture in relation to it; thus the cable was used in the performance of a contract with the United States to improve real property within the state and subject to tax under Section 6384 of the Code and under Regulation 1615, which interpreted that section. The court also held that Section 6016.5 of the Code excludes from the definition of tangible personal property only completed electrical transmission lines and not components used in the construction or repair of the lines. Accordingly, the purchase of the cable by plaintiff to use in the performance of the contract to improve real property was subject to tax. *Chula Vista Electric Co. v. State Board of Equalization* (1975) 53 Cal.App.3d 445.

Sales of Lottery Ticket Forms to California Lottery Commission Not Exempt from Sales Tax

Taxpayer entered into a contract with the California Lottery Commission for the printing of instant game tickets, and opened a plant in the city of Gilroy to manufacture the tickets. The Board advised taxpayer and the Lottery Commission that sales of the tickets were subject to tax. Taxpayer paid the tax and filed a claim for refund, arguing that the sales were exempt pursuant to Government Code Section 8880.68, which provides that no state

or local taxes shall be imposed upon the sale of lottery tickets. The Board voted to grant the refund and so informed Gilroy, which filed a lawsuit seeking to set aside the refund decision.

The court found in favor of Gilroy, first determining that Section 8880.68 did not exempt taxpayer's sale of the printed lottery tickets to the Lottery Commission from sales tax. The key ingredient of a lottery ticket is the right of the purchaser to a chance to win, which derives from the authority of the Lottery Commission, not taxpayer, to dispense that right. Therefore, Section 8880.68 did not apply to taxpayer's sale of printed material to the Lottery Commission.

The court also found that Gilroy had standing to challenge the Board's refund decision, even though the statutory procedure permits only the taxpayer to claim a refund of erroneously collected taxes, and there is no provision for local entities to participate in refund proceedings initiated by retailer-taxpayers within their jurisdiction. In *County of Sonoma v. State Board of Equalization* (1987) 195 Cal.App.3d 984, the court held that the Bradley-Burns Law, which required the county to contract with the Board to administer its sales tax ordinance, implicitly granted the county standing to judicially challenge the Board's actions under the contract, including its interpretation and application of a statutory tax exemption. The court followed the rationale in *County of Sonoma v. State Board of Equalization*, since the Board's actions to reclaim sales tax revenue from Gilroy and its decision whether to collect sales tax from taxpayer in the future were taken pursuant to its duties and powers under the Bradley-Burns Law and its agreement with Gilroy.

The court held that collateral estoppel did not bar litigation of the legal issues relating to interpretation and application of Section 8880.68 because, even though those issues were the subject of an administrative proceeding before the Board, neither the Board as decision maker nor the Board's staff were in privity with Gilroy. *City of Gilroy v. State Board of Equalization* (1989) 212 Cal.App.3d 589.

Firm Selling and Installing Deep Well Agricultural Pumps is Not a Construction Contractor; Board's Pooling Arrangement for Allocation of Local Taxes is Valid

Plaintiff was a pump company engaged in the business of selling and installing deep well agricultural pumps. It had a permanent place of business in the City of San Joaquin, Fresno County, and conducted all of its business from that plant, but it installed the pumps at various sites throughout Fresno, Kings, Tulare, and Madera Counties.

Under ruling 11, the Board had classified all retail dealers of deep well agricultural pumps as construction contractors, and had classified the pumps as fixtures. The effect of this was to make each jobsite where the pumps were installed a place of business of the pump company. This meant that the

Bradley-Burns uniform local sales and use tax due on sales of pumps was then to be allocated to the county where each pump was installed rather than to the City of San Joaquin.

The court held that these deep well agricultural pumps were not fixtures, because they were not affixed to the land in a permanent fashion, had a useful life of only a few years, and did not become an integral part of an irrigation system. Because they were set in open spaces, were held in place by gravity, were movable, and were often moved from one well to another and were moved to San Joaquin for repairs, the pump company was not a construction contractor, but was instead a seller and installer of machinery and equipment with regard to these pumps.

On another issue in the same case, the court upheld the Board's pooling arrangement for allocation of Bradley-Burns local taxes generated by construction contracts. On over the counter sales, the revenues are allocated to each taxing jurisdiction in direct proportion to the reported sales attributable to that jurisdiction. Taxes derived from construction contracts are not allocated on a transaction for transaction basis, but are placed in a countywide pool and allocated to each jurisdiction in the same proportion as the revenue from over-the-counter sales for the same quarterly periods. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365.

Board's Categorization of Elevator Components as Fixtures and Materials is Not Arbitrary or Unreasonable

Plaintiff, which furnished and installed elevators, claimed that Regulation 1521 and General Bulletin 67-9, distinguishing for sales tax purposes between fixtures and materials incorporated into structures, are vague, uncertain, ambiguous, conflicting, and unreasonable, and in addition, result in taxation of real property contrary to law.

Regulation 1521 provides that construction contractors are the consumers of materials and the retailers of fixtures which they furnish and install in the performance of construction contracts. Where the contractor is the manufacturer of the fixtures, the retail selling price is considered to be the prevailing price at which similar fixtures in similar quantities ready for installation would be sold to contractors. General Bulletin 67-9 categorizes elevator components as either materials or fixtures. Plaintiff claimed that elevator systems that it installs constitute an integrated portion of the structures, are not accessory to the structures, and are required for the operation of the services of the structures. They cannot be removed without substantial damage to the structure and clearly seem to meet all of the tests of materials incorporated into a structure. The court, following *General Electric Co. v. State Board of Equalization* (1952) 111 Cal.App.2d 180, held that the legal issue is not the status of the subject matter in the hands of the buyer but in the hands of the seller. Even if *General Electric Co. v. State Board of Equalization* were not followed, services included in the sales price

of personal property are subject to tax. Where a retailer fabricates parts which are incorporated into a fixture, such fabrication is included in the sales price of the fixture. Where classifications established by an administrative agency are not arbitrary or capricious, a court will not substitute its own judgment for that of the agency. The showing made by the plaintiff failed to establish that the rules and policies of the Board were arbitrary or had no rational basis. *Coast Elevator Co. v. State Board of Equalization* (1975) 44 Cal.App.3d 576.

Sales Price of Elevators Includes Preinstallation Labor to Assemble Component Fixtures

Taxpayer sold and installed elevator systems. Taxpayer purchased component fixtures and, at its factory, assembled the components into the elevators prior to installing the elevators at the jobsite. The Board determined that taxpayer was a manufacturer of fixtures and assessed sales tax on the labor and overhead attributable to the factory assembly of the components. Taxpayer contended that it was the retailer of the component fixtures, and the factory labor to affix the components to other components of the elevator system was nontaxable installation labor.

The court of appeal held in favor of the Board. The court held that the Board's Regulation 1521 (Construction Contractors) correctly applies tax to assembly labor which occurs before the affixation of fixtures to real property. Labor is properly regarded as taxable fabrication labor when, at the factory or at the jobsite, component fixtures are assembled into other component fixtures before the completed elevator system is finally installed as an attachment to real property. *Coast Elevator Co. v. State Board of Equalization* (1986) 186 Cal.App.3d 206.

Claim for Refund of Unconstitutional District Taxes

Plaintiff motor vehicle fuel retailers sought refund of district taxes they had paid to the state which were later declared to be unconstitutional. Plaintiffs argued that they had the right to file an action for refund of such taxes even though the Legislature had adopted a comprehensive statutory scheme whereby it is the purchasers who have the right to file the claims for refund of unconstitutional district taxes, rather than retailers as is generally the case. The Court of Appeal held that the statutory scheme was constitutional and that it clearly prohibited these retailers from filing claims. Since plaintiffs had no statutory basis for maintaining an action for refund, the trial court's dismissal of the suit was upheld. *Cod Gas & Oil Co., Inc. v. State Board of Equalization* (1997) 59 Cal.App.4th 756.

A District Tax Adopted by a Simple Majority Vote is Valid because it is not a Special Tax

The voters of Santa Clara County adopted a new district tax during the 1996 general election by a simple majority vote (51.8 percent). This tax was adopted as Measure B, which specified that the ½ percent sales and use tax

would be used for general county purposes. During the same election, the voters also approved Measure A by 77.6 percent of the vote. This was characterized in the measure itself and in the voter pamphlet as advisory only. It specified the voters' intent that any new sales tax revenue should be spent on certain projects specified in that measure.

Plaintiffs challenged the new tax as an attempt to circumvent the supermajority requirement for special taxes in that the measures were inseparably linked, meaning that Measure B was actually a special tax requiring a two-thirds vote to be validly adopted rather than a mere majority vote as required for a general tax. The Court of Appeal held that, although the two ballot measures were closely related to each other, they were not, in fact, legally connected. By itself, Measure B was a general tax which could be adopted by majority vote. Despite the passage of Measure A, the County was free to spend Measure B revenue on any and all County purposes without restriction, and the validity of neither measure was dependent on the passage of the other. The court therefore upheld the validity of the new tax. *Coleman v. County of Santa Clara* (1998) 64 Cal.App.4th 662.

Regeneration of Water Purification Tanks is Taxable Sale

Taxpayer was in the business of selling and servicing water purification tanks. After resins in the tanks became depleted and were no longer usable to remove impurities, taxpayer replaced the tanks with similar tanks which had been regenerated at the taxpayer's plant. Taxpayer contended that the regeneration charges for replacing the depleted tanks were service transactions not subject to tax.

The court of appeal held in favor of the Board, stating that Sales and Use Tax Regulation 1546(b)(4) provides that a taxable sale includes the reconditioning of tangible personal property by delivery to the customer of reconditioned property which has been commingled with the same kind of property as that the customer originally delivered to the reconditioner. The court held that under the authority of Regulation 1546 and *Culligan Water Conditioning v. State Board of Equalization* (1976) 17 Cal.3d 86, the taxpayer's regeneration charges were taxable sales of the regenerated tanks. *Continental Water Conditioning Co. v. State Board of Equalization* (1989) 207 Cal.App.3d 783.

1986 Legislation Provided Retroactive Exemption from Tax of Sales of Geothermal Steam

The County of Sonoma and an individual resident of that county brought an action to compel the Board to assess and collect tax on sales of geothermal steam at The Geysers.

Plaintiffs contended that the pre-1986 sales and use tax exemption for sales of gas and water through mains, lines, or pipes did not exempt geothermal steam and that the Board lacked authority to exempt geothermal steam from tax.

The Board (and intervenors—companies who would be assessed tax if their sales of geothermal steam were found to be taxable) contended: (1) that the Board’s longstanding administrative interpretation was correct and (2) that 1986 legislation (SB 2315) expressly exempted geothermal steam and intended that this exemption apply retroactively.

The court of appeal held in favor of the Board, concluding that a clear legislative intent of SB 2315 was to exempt retroactively pre-1986 sales of geothermal steam. The court held that the retroactive exemption was not a constitutionally prohibited gift of public funds since the exemption served an important public purpose, the protection of alternative energy sources including geothermal energy. *County of Sonoma v. State Board of Equalization* (1987) 195 Cal.App.3d 982.

Plaintiff Cannot Voluntarily Dismiss Complaint to Avoid Summary Judgment Motion

Plaintiff filed a complaint in connection with an audit conducted at its business accusing the Board of negligence in failing to treat plaintiff with respect and dignity and in failing to investigate charges by her. The Board filed a motion for summary judgment, but before the hearing and without filing any opposition to the Board’s motion, plaintiff filed a request for dismissal without prejudice. Although the clerk completed the form stating that the dismissal was entered before the hearing, the Board received no notice of the dismissal and therefore appeared at the hearing on the summary judgment motion. The trial court granted the summary judgment in the Board’s favor, and this appeal followed.

The Court of Appeal held that the right of the plaintiff to voluntarily dismiss an action before trial is not absolute. The court followed an earlier decision which did not allow the plaintiff to avoid summary judgment by voluntarily dismissing, without prejudice, for the purpose of reasserting the same allegations after refileing the complaint that the plaintiff could not, or would not, defend when challenged by the defendant’s summary judgment motion. In this case, the court upheld that the trial court’s finding that the Board’s moving papers met the Board’s burden, and that plaintiff could not avoid the adverse ruling by the strategem of filing a last minute request for dismissal without prejudice. *Cravens v. State Board of Equalization* (1997) 52 Cal.App.4th 253.

Furnishing of Water Conditioning “Exchange Units” is Lease Rather than Service

Plaintiff furnished to its customers water conditioning “exchange units” acquired without payment of sales tax reimbursement or use tax. The exchange units were inserted into the plumbing of customers homes and were replaced periodically by plaintiff in order to provide soft water continuously. The customers paid an initial charge for plumbing system alterations and thereafter paid monthly or bi-monthly charges. The Board asserted tax on the

periodic payments on the basis that they were receipts from the lease of tangible personal property. Plaintiff paid the tax asserted and sued for refund on the basis that the periodic payments were for the service of providing soft water, and receipts from sales of services are not subject to tax.

The Supreme Court overruled the trial court and upheld the position of the Board. The court held that while an administrative agency's interpretation of its own regulation deserves great weight, the ultimate resolution of such legal questions rests with the courts. The court then went on to find that the transaction contained the requisite elements of a "hiring" under Civil Code Section 1925 as well as the elements of a "lease," and that the "real object" of the customer within the meaning of Sales and Use Tax Regulation 1501 was to obtain the property produced by the service rather than the service per se. *Culligan Water Conditioning v. State Board of Equalization* (1976) 17 Cal.3d 86.

Use Tax Collection Duties Imposed upon Out-of-State Retailer Owned by Company Engaged in Same or Similar Business Held Unconstitutional

Plaintiff was an out-of-state mail-order company whose only connection with customers in California was by common carrier or United States mail. The plaintiff was acquired by a corporation who was a retailer engaged in business in California. The Board regarded plaintiff as a retailer engaged in business in California required to collect use tax under subdivision (g) of Revenue and Taxation Code section 6203.

The court of appeal held that the mail-order company was immune from the duty to collect use tax under the Commerce Clause, and its acquisition by a company engaged in business in California did not render it liable for collecting the tax. The plaintiff and the acquiring company did not have integrated operations or management, were organized and operated as separate and distinct corporate entities, and neither was the alter ego or agent of the other for any purpose. The plaintiff did not have sufficient physical nexus with California to justify the imposition of the duty to collect use tax, and, as applied to the plaintiff, the statute was unconstitutional as violative of the Commerce Clause. *Current, Inc. v. State Board of Equalization* (1994) 24 Cal.App.4th 382.

D

Sales of Manufacturing Plants Not "Occasional Sales"

Plaintiff purchased two manufacturing plants and agreed to be responsible for any sales tax ultimately found to be due on those transactions. Plaintiff paid the tax, and then sued for refund contending that the sales were exempt "occasional sales" as defined in Section 6006.5(a). This section defines an "occasional sale" as a sale of property not held by a seller in the course of activities for which he is required to hold a seller's permit. "Seller" is

defined in Section 6014 as every person engaged in selling tangible personal property of a kind the gross receipts from the retail sale of which are required to be included in the measure of the sales tax. Section 6066 requires all sellers to hold seller's permits.

Plaintiff's vendors held seller's permits, but prior to the sales of the plants, all sales of manufactured products had been made to distributors for resale at retail. No prior sales of manufacturing equipment had been made. Plaintiff claimed that the vendors were not sellers within the meaning of the law and that the sales of the plants were therefore exempt occasional sales. Plaintiff relied on *Glass-Tite Industries, Inc. v. State Board of Equalization* (1968) 266 Cal.App.2d 691, in which a manufacturer was found not to be a seller.

The court upheld the Board, distinguishing *Glass-Tite* on the basis that the products in *Glass-Tite* were unsuitable for sale at retail and were not property of a kind the gross receipts from the retail sale of which were taxable. The products of plaintiff's vendors were of a kind the retail sale of which were taxable; thus, the vendors were sellers under the law. The sales of the plants were therefore sales of property held in the course of activities for which seller's permits were required, so they were not "occasional sales."

Plaintiff also argued that its vendors were not retailers and so were not subject to tax because Section 6051 imposes sales tax only on retailers. The court held, however, that the vendors were "retailers" under Section 6015, which defines "retailer" as including any seller who makes a retail sale. The court stated that Section 6019, which provides that a person making more than two retail sales in a 12-month period shall be considered a retailer, supplemented rather than replaced or constricted Section 6015. *Davis Wire Corp. v. State Board of Equalization* (1976) 17 Cal.3d 761.

Use Tax Imposed on Leases of Property Purchased from Bankruptcy Estate does not Interfere with Process of Bankruptcy Court

Taxpayer was in the business of selling and leasing property purchased from a bankruptcy trustee liquidating a bankruptcy estate. The Board issued determinations for payment of the use tax on rental receipts derived from taxpayer's leases of livestock and equipment purchased from the trustee.

The Court of Appeal upheld the tax, holding that a use tax on rental receipts derived from leases of livestock and equipment purchased from a bankruptcy trustee did not constitute an unlawful interference with the process of the bankruptcy court. *Debtor Reorganizers, Inc. v. State Board of Equalization* (1976) 58 Cal.App.3d 691.

Offset of Fuel Tax Overpayment Must be Claimed in a Timely Manner

Taxpayer is a common carrier subject to sales tax imposed by California law on fuel used by common carriers while conducting the business of interstate transportation. The fuel necessary to reach the common carrier's first out-of-state destination is subject to sales tax, while the remainder of the

fuel used for transportation is exempt. Taxpayer reported the amount of fuel subject to the tax based on estimates, and the Board verified the accuracy of the estimates by requiring a five-day test of actual fuel consumption. The Board applied the five-day test period results to bills of lading filed by taxpayer, and credits for overpayments of tax as measured by the test results were offset against charges for underpayments of tax, as also measured by such results. However, in November 1977 the Board amended its Sales and Use Tax Regulation 1621(d)(1) to require that changes of “estimated” fuel consumption to actual fuel consumption be made within the appropriate reporting period. Taxpayer failed to observe the time requirements and the Board assessed additional sales tax where underpayments were found, but did not allow offsets for overpayments. Taxpayer filed a claim for refund, arguing that it was unfair for the Board to abandon its prior practice of taking into account both overpayment and underpayment. The trial court awarded taxpayer the overpayments.

The court of appeal held for the Board and upheld the validity of Regulation 1621. The regulation had a clear purpose (to facilitate the collection of sales tax by keeping payment of the tax as current as possible), set forth with particularity what was required to claim the exemption, and was not unreasonable. The court found that the relationship between the procedure established by Regulation 1621 and the legitimate objectives of the Board was evident. The court also found that taxpayer, as the real party in interest, had standing to bring the action for refund, even though the tax was paid by the vendors of the fuel and not the common carrier. *Delta Air Lines, Inc. v. State Board of Equalization* (1989) 214 Cal.App.3d 518.

Sales to National Banks for Prior Periods Not Subject to Tax

Plaintiffs were the sellers of business forms to a chartered national bank and the bank itself. The Board had collected sales tax from the sellers on sales of printed forms and other personal property to the bank. Plaintiffs contended that the legal incidence of the tax was on the bank and that, since the bank was exempt from the payment of sales tax under federal and state law, tax could not be applied to the sales. Despite uniform interpretation by California courts that the incidence of the sales tax is on the seller, the United States Supreme Court reversed the California Court of Appeal and found that the incidence of tax fell illegally upon the purchasing national bank. (The federal law was changed effective after the period involved in the case to permit the application of tax to sales to national banks.) *Diamond National Corp. v. State Board of Equalization* (1976) 425 U.S. 628, 47 L.Ed.2d 780.

Federal Tax Injunction Act does not Bar Out-of-State Retailers from Challenging an Obligation to Collect Use Tax from Customers

Plaintiff was a trade association whose members engaged in direct mail advertising and marketing of products for sale. A majority of plaintiff's members were mail houses located outside California that accepted orders

for products by mail or telephone for shipment to customers inside the state. The Board required many of plaintiff's out-of-state members selling products to California residents by use of credit cards issued by California financial institutions to register as retailers engaged in business pursuant to former section 6203(f). That former section deemed a person engaged in business inside California where, among other things, it made substantial and recurring solicitations for orders by mail and benefited from any banking or financing activities occurring inside the state. The federal district court dismissed the action on the basis that the Tax Injunction Act barred the proceedings in federal court.

The Court of Appeals reversed, holding that the Tax Injunction Act did not bar plaintiff from relief since it was not entitled to a "plain, speedy and efficient remedy" in a state court. The court found that plaintiff lacked a state remedy for two reasons. First, plaintiff could not make a claim for refund of tax since its customers, and not plaintiff, were liable for the use tax. Second, the court found that a remedy was not available because the Board had not yet issued a determination. The issuance of a determination was speculative and did not create certainty that a remedy would be available to plaintiff. *Direct Marketing Ass'n, Inc. v. Bennett* (9th Cir. 1990) 916 F.2d 1451.

Alterations of New Clothing are Taxable as Fabrication Labor

Plaintiff, a dry cleaning and tailoring shop, altered new clothing for customers who had purchased the clothing elsewhere and had not worn the clothing except for trying on or fitting. The Board estimated and determined tax on the alteration charges as fabrication labor under Revenue and Taxation Code section 6006(b) and Regulation 1524. The plaintiff filed an action for refund, and the trial court entered judgment for the plaintiff.

The court of appeal reversed and held in favor of the Board. The court held:

(1) Charges for alterations to new clothing, furnished by the customer, constituted a step in the producing or fabricating of a product and were therefore taxable as sales.

(2) Fabrication labor is taxable even though the taxpayer, rather than the customer, furnished economically insignificant materials, such as thread, to assemble or hold together the materials supplied by the customer.

(3) A transfer of title to tangible personal property is not necessary to constitute a taxable sale under section 6006(b).

(4) The phrase "new clothing" in Regulation 1524 is not unconstitutionally vague; the regulation itself, the Board's rulings, and judicial construction of section 6006(b) gave taxpayer reasonable notice that he would be liable for sales tax.

(5) Taxpayer failed to exhaust his administrative remedies when he refused to cooperate with the Board in arriving at a fair calculation of tax due. *Duffy v. State Board of Equalization* (1984) 152 Cal.App.3d 1156.

E

Sales Tax Exemption for Interstate Shipments Requires Actual Out-of-State Delivery

Taxpayer, a retail truck dealer, sold 42 trucks for shipment by a carrier to designated Arizona locations where deliveries to the buyers were to have occurred. The bills of lading showed Arizona delivery points, and the buyers each certified on Department of Motor Vehicles forms that delivery to the buyer occurred in Arizona. However, the carrier in fact delivered the trucks to the buyers in California.

The Board assessed sales tax against the taxpayer on the grounds that Revenue and Taxation Code Section 6396 requires actual out-of-state delivery as a condition of the sales tax exemption for interstate shipments. The taxpayer contended that (1) Section 6396 only requires actual delivery to the carrier for out-of-state shipments, and (2) if the sales were not exempt, the buyer's certificates attesting to out-of-state delivery shifted the tax liability to the buyers under Revenue and Taxation Code Section 6241 (purchaser is liable for sales tax if he certifies his use of the property exempts the seller from sales tax, but uses the property for some other purpose).

The court of appeal held in favor of the Board. Section 6396 requires actual out-of-state delivery to the buyer, and the Board's Regulation 1620 correctly interprets Section 6396 to apply sales tax where the buyer takes delivery in the state, regardless of the documentary evidence held by the seller. The tax liability was not shifted to the buyers under Section 6241 because the buyers only certified that they took delivery out of state, not that they used the property for an exempt purpose following delivery. *Engs Motor Truck Co. v. State Board of Equalization* (1987) 189 Cal.App.3d 1458.

F

Transmission Lines are Improvements to Real Property. Taxpayer is Liable for Tax, but Not for Interest, Even if Given Erroneous Advice by Board

Taxpayer, a contractor, entered into a contract with the United States Government for the construction of a transmission line. The taxpayer did not pay tax on the above-ground materials under the erroneous belief that the materials were personal property and were tax exempt sales to the United States, as provided in Revenue and Taxation Code section 6381. Following a series of court cases which found that for sales and use tax purposes, transmission lines in their entirety were improvements to real property, the Board redetermined the amount of tax and interest the taxpayers owed. The taxpayers paid the full amount and filed an action for refund.

The court of appeal held that transmission lines and supporting installations are properly classified as improvements to real property and that taxpayers, as the users of the materials consumed in the performance of the contract to improve real property, were required to pay the use tax. The court further held that where a Board employee had previously given the taxpayer erroneous advice, the Board was not estopped from collecting the tax which was due and owing, but the collection of interest under such circumstances was inequitable and unjustifiable. Thus, taxpayers were able to recover the amount paid as interest. *Fischbach & Moore, Inc. v. State Board of Equalization* (1981) 117 Cal.App.3d 627.

Sales Price of Leased Equipment Includes Balance of Unpaid Rental Receipts

The seller purchased equipment tax-paid and leased it to the buyer for a term of 84 months, with an agreement allowing the buyer to purchase the equipment for \$9,000 after the completion of the rental payments. The buyer decided to buy the equipment after 52 months. The seller sold it for the originally agreed-upon price of \$9,000, plus the unpaid rental receipts balance of \$56,110, less unearned finance charges of \$7,578.

The Board assessed tax on the entire amount paid, including the unpaid rental receipts. The seller contended the sale was a modification of the lease, which increased the final rental payment, and that only the originally agreed-upon sales price was subject to tax.

The court of appeal held in favor of the Board. The contract for sale necessarily terminated the original lease agreement and brought about a redetermination of the value of the equipment. The amount paid for the transfer of title did not constitute lease payments but was the sales price. *Framingham Acceptance Corp. v. State Board of Equalization* (1987) 191 Cal.App.3d 461.

G

Suit to Collect Taxes Untimely Because not Filed within Three Years after the Tax had become Delinquent

In June 1982, the Board issued a demand for immediate payment against taxpayer for tax due on the purchase of an aircraft. The Board recorded a notice of state tax lien in San Diego County on February 1, 1989 and filed a suit to collect taxes on June 19, 1990. The issue was whether the Board timely filed its suit to collect taxes.

The court held that Revenue and Taxation Code section 6711 allows the state to bring an action in personam (i.e., an action to establish personal liability of taxpayer) within three years after the tax becomes due and payable and after delinquency, but no later. The reference in the statute to the

period during which a recorded lien is in effect is for an action to enforce a lien, not for an in personam action. Since the Board brought the suit to collect taxes more than three years after the delinquency, the suit was not timely. *People v. Garg* (1993) 16 Cal.App.4th 357.

Attorney's Fees Awarded under the Taxpayers' Bill of Rights should not be Offset against Taxes Owed

In a Board-initiated action for collection of a tax lien, the trial court held in favor of taxpayer based on the statute of limitations. The court awarded attorney's fees to taxpayer under Revenue and Taxation Code section 7156, based on its finding that the Board's action was not substantially justified. The Board offset the court-ordered attorney's fees against the outstanding liability. Taxpayer filed suit, claiming in part that the action was for refund of tax.

The Court of Appeal agreed with the Board that the trial court lacked jurisdiction to decide the matter as a refund of tax because "the California Constitution forbids a court from adjudicating the validity of a tax before the tax, together with interest and penalties, has been paid in full." However, the appellate court held that litigation costs awarded under section 7156, a part of the Taxpayers' Bill of Rights, are not an ordinary debt to taxpayer which can be offset under Government Code sections 12419.4 and 12419.5. *Garg v. State Board of Equalization* (1997) 53 Cal.App.4th 199.

Sales of Custom Computer Programs were Nontaxable Services

Taxpayer transferred custom computer applications programs to its customers on punched cards between 1972 and 1976. The Board imposed sales tax on these sales under Sales and Use Tax Regulation 1502(f)(2) because the computer programs were transferred on tangible storage media, the punched cards which customers used to install the programs on their computers. The trial court ordered the Board to refund the taxes paid.

The court of appeal affirmed, and held that Regulation 1502(f)(2) was void as in excess of the Board's statutory authority. Revenue and Taxation Code Section 6010.9, enacted in 1982, provided that transfers of custom computer programs on tangible storage media are neither sales nor purchases under the Sales and Use Tax Law. The Legislature further declared that transfers of custom programs were non-taxable services, and that section 6010.9 was declaratory of existing law. The court held that the 1982 legislation supports the conclusion that the true object of the transfer of the custom programs on punched cards was the performance of services by the taxpayer. *General Business Systems, Inc. v. State Board of Equalization* (1984) 162 Cal.App.3d 50.

Thrift Shop did Not Qualify for Exemption

A charitable organization which operated several thrift shops brought a suit for refund of sales tax paid to the Board of Equalization on sales at its shops. It was the Board's position that the organization did not qualify for the exemption provided to charitable organizations pursuant to Section 6375 of the Revenue and Taxation Code because the organization had not received a property tax exemption pursuant to Section 214 of the code. The trial court granted judgment in favor of the Board.

The court of appeal affirmed, holding that the organization had not met its burden of showing that the sales in question were made "as a matter of assistance to the purchasers" as required by Revenue and Taxation Code Section 6375. The court noted that the organization's statement that the sales were made to the general public, without any indication of what prices were charged or what prices were lower than those charged for comparable products by retailers, resulted in the organization not qualifying for the welfare exemption. *Good Shepherd Lutheran Home of the West v. State Board of Equalization* (1983) 139 Cal.App.3d 876.

Tax Claims in Arrangement Proceeding

The Board sought to collect postpetition interest and pre- and postpetition penalties for late payment of sales tax from petitioner, who had reorganized pursuant to a plan of arrangement filed under Chapter XI of the Bankruptcy Act. Petitioner took the position that under the plan the interest and penalties were the obligation of the debtor estate; that certain postpetition sales tax credits resulting from the writeoff of bad debts were properly the property of petitioner, not the estate; and that postpetition penalties and interest were the obligation of the estate, in any regard, since the receiver was dilatory in paying the underlying obligations.

The court upheld the finding of the referee that the amounts in question were the obligation of the petitioner. The court held that the plan of arrangement did not purport to allow payment of the obligations in question; that under the Bankruptcy Act allowances for prearrangement penalties and postpetition interest are precluded, as are allowances for postpetition penalties in instances where the penalties cannot be prevented without payment of prepetition penalties; and that the instant obligations were not classed as expenses of the administration under the plan.

The court further held that the right to the tax credits properly passed with the underlying receivables, which passed under the plan of arrangement to the estate, since under Revenue and Taxation Code Section 6901, the credits were payable to the person who paid the excess tax amount. The receiver was not liable for the postpetition penalty and interest due to his failure to pay the tax promptly, since he could not legally pay the postpetition penalty in any regard and since the record did not clearly indicate that the receiver's delay

was due to factors other than those inherent in bankruptcy proceedings. *Gough Industries, Inc. v. Rothman* (9th Cir. 1971) 446 F.2d 536, cert. den. (1972) 405 U.S. 916.

H

Revenue and Taxation Code Section 6359(c) Held Constitutional

Plaintiffs were restaurant owners who also operated drive-ins providing carhop services. They sought to recover sales and use taxes paid by them on sales of “take-out” orders. Such orders are taxable under subparagraph (c) of Section 6359 of the Revenue and Taxation Code when the food is purchased at a drive-in type of operation, whether or not it is consumed on the premises, although “take-out” orders at conventional restaurants are exempt. The drive-in operators argued that subparagraph (c), and the Board’s administration thereof, was unconstitutionally vague, and arbitrarily discriminated between drive-ins and conventional restaurants.

The court of appeal, in holding the provision constitutional, found that the distinctions made in the statute had a rational basis in the Legislature’s desire to equalize competition and tax burdens between conventional restaurants and newly evolving forms of eating establishments where food was consumed in a similar manner, whether inside one’s own car or inside a restaurant. The court also found that the statute prescribed a standard sufficiently definite to be understandable to the average person desiring to comply therewith. *Henry’s Restaurants of Pomona, Inc. v. State Board of Equalization* (1973) 30 Cal.App.3d 1009.

California Constitution does not Prohibit Sales Tax on Sales to State Banks

Taxpayer sold tangible property to a state-chartered bank and collected sales tax reimbursement from the bank. Both taxpayer and the bank filed suits for refund of the sales taxes on the sales. Although for federal purposes the legal incidence of the sales tax fell on a national bank meaning that sales to national banks were immune from sales tax prior to 1969 federal legislation, the Court of Appeal held that for state purposes the legal incidence of the sales tax falls on the retailer, not the state bank, even though the economic burden is borne by the bank. The court also held that the California Constitution, Article XIII, former Section 16 (now net income tax), does not prohibit sales taxes levied on retailers’ sales to state banks, even though sales to national banks were not similarly taxed. *Hibernia Bank v. State Board of Equalization* (1985) 166 Cal.App.3d 393.

Board’s Categorization of Air Conditioning Control Components is Not Arbitrary or Unreasonable

Plaintiff, who furnished and installed air conditioning control systems under lump sum contracts, claimed that Regulation 1521 and General Bulletin 67-8, distinguishing for sales tax purposes between fixtures and

materials incorporated into structures, are vague, uncertain, ambiguous, conflicting, and unreasonable, and are also in conflict with Regulation 1615, which deals with the United States government contractors.

Regulation 1521 provides that construction contractors are consumers of materials and retailers of fixtures which they furnish and install in the performance of construction contracts. Where the contractor is the manufacturer of the fixtures, the retail selling price is considered to be the prevailing price at which similar fixtures in similar quantities ready for installation would be sold to contractors. General Bulletin 67-8 deals with the measure of tax on fixtures installed by manufacturers under lump sum construction contracts. Plaintiff claimed that the correct measure of tax is the cost to plaintiff of only the materials in the devices used in air conditioning control systems that it installs, because these systems become an integral and inseparable part of the completed structure.

The court, noting that plaintiff manufactures and sells air conditioning control devices that are packaged ready to install and that these devices can be individually and readily removed without damage to the building, stated that it is within the power of the Board to determine that such devices are fixtures rather than materials. Plaintiff argued that the tax result where the manufacturer installs the device and the sale price of the device and the charge for installation services are stated together should differ from the tax result of the sale of the device alone. The court stated that such commingling may present an accounting problem of segregation, but the legal tax consequences do not change. The court also held that in furnishing and installing the fixtures, plaintiff was a retailer and was not making sales to contractors for resale by them.

In a subsidiary issue, the court held that failure of the Board to act on a claim for refund within six months could be treated by plaintiff as a denial of the claim for purposes of instituting an action. *Honeywell, Inc. v. State Board of Equalization* (1975) 48 Cal.App.3d 897.

Validity of Regulation 1521 Upheld

Plaintiffs, who manufactured and installed elevators or temperature control systems, sought a declaratory judgment that Regulation 1521 was arbitrary and ambiguous and therefore void as applied to transactions that plaintiffs had entered into for the installation of their products. Regulation 1521 provides that construction contractors are consumers of materials and retailers of fixtures which they furnish and install in the performance of construction contracts.

Plaintiffs also contended that the regulation was discriminatory since it distinguished between contractors generally and United States government contractors in the application of tax.

While the court stated that a taxpayer may test the validity of a tax regulation by an action for declaratory relief before he has acted so that he may govern his conduct accordingly, it seriously questioned whether such an action is appropriate after a taxpayer has entered into a transaction which the taxing authorities claim is taxable. Granting such relief would appear to circumvent Section 6931 of the Revenue and Taxation Code which prohibits the granting of an injunction or writ of mandamus to prevent the collection of tax.

The court went on to uphold the validity of Regulation 1521, stating that any difficulty in drawing lines stemmed from problems inherent in the basic legal concept of fixtures. The uncertainty in drawing a line between fixtures and materials justifies a process of initial administrative determination subject to judicial review, since it is better to resolve gray areas, no matter how laborious the effort, than to allow retail sellers of fixtures to escape their fair share of tax.

The court also held that since the United States government has a unique taxable status, a rule is not necessarily invalid just because it distinguishes between contractors generally and United States government contractors. *Honeywell, Inc. v. State Board of Equalization* (1975) 48 Cal.App.3d 907.

Taxpayer has Burden of Proof to Show it is Entitled to Refund Claim

In an action by a taxpayer against the State Board of Equalization seeking refunds of sales and use taxes paid on leases of certain equipment, the trial court ruled that the taxpayer had the burden of providing that its lessees had paid the use tax.

The court of appeal affirmed, holding that the trial court had properly placed the burden on plaintiff to prove that the lessees had paid the use tax on the leased property and that the Board had properly determined the tax due on fixtures installed by plaintiff under lump sum construction contracts on the basis of the "transfer cost" of such fixtures as set forth in documents prepared by plaintiff for its use in bidding on the construction contracts, since similar fixtures were not sold to contractors on the open market. The court also held the trial court had properly found that plaintiff had not established by a preponderance of admissible evidence that certain sales it had made were in fact for resale. The court also held that the trial court properly found plaintiff failed to meet its burden of showing nontaxability as to the purchase of tangible personal property from an out-of-state manufacturer. *Honeywell, Inc. v. State Board of Equalization* (1982) 128 Cal.App.3d 739.

Sales Tax Imposed by School District Held Invalid

In 1991, the Legislature passed the Educational Financing Act, authorizing the San Francisco Unified School District and the San Francisco Community College District to create the Educational Financing Authority (EFA), for the general purpose of providing financial assistance to each school district

within the city and county. The Act authorized the EFA to impose a sales tax by an ordinance approved by majority vote. Such an ordinance was approved by a majority (but less than two-thirds) of the qualified electors voting.

Plaintiffs asserted that the tax was unconstitutional under Article XIII A, section 4 of the California Constitution (Proposition 13), which requires that special taxes by special districts be approved by two-thirds of the qualified electors voting on the measure. The court of appeal held that school districts are special districts within the meaning of Proposition 13, and that a taxing agency such as the EFA, created and controlled by school districts, is a special district. The court of appeal also held that the tax at issue was a special tax. Therefore, the EFA needed two-thirds voter approval before imposing a one-quarter of one percent transactions and use tax. Since the tax did not get such a supermajority vote, the tax imposed was invalid. *Hoogasian Flowers, Inc. v. State Board of Equalization* (1994) 23 Cal.App.4th 1264.

Sale of Hotel Assets Held Taxable

Plaintiff sold its entire interest in the assets, fixtures, and property of a hotel it operated. Sales tax was assessed, measured by the sales price of the tangible personal property, including hotel furniture and fixtures transferred as part of the sale. Plaintiff operated a hotel, restaurant, bar, and smoke shop and had made numerous “salvage sales” of property of the type disposed of in the final sale. Plaintiff contended that the sale of its capital assets qualified as an “occasional sale” within the meaning of Section 6006.5(a) of the Revenue and Taxation Code and was thus exempt under Section 6367.

The court of appeal held that the tax had been properly assessed. Plaintiff was engaged in the activity of making numerous sales at retail and was, therefore, required to hold a seller’s permit. The property sold was held in an activity which required the holding of such a permit. Further, since the capital assets sold during the months prior to the sale in question were of the same type as those sold in the questioned sale, that sale was one of a series of sales sufficient in number, scope, and character to require the holding of a seller’s permit. *Hotel Del Coronado v. State Board of Equalization* (1971) 15 Cal.App.3d 612.

Local Retail Transaction and Use Tax Ordinances Held Invalid if Not Approved by Two-Thirds of County’s Voters

In 1989, the Legislature enacted the Orange County Regional Justice Facilities Act and the County Regional Justice Facilities Financing Act, which authorized counties to establish agencies for purposes of financing and coordinating the construction, acquisition, furnishing, maintenance and operation of adult and juvenile detention facilities and courthouse facilities. The Acts authorized the agencies to adopt by ordinance a county-wide sales tax by a majority of the electors voting on the measure.

Plaintiffs challenged the Acts, seeking a declaration that they unconstitutionally authorized a special district to impose an ad valorem tax without securing approval of two-thirds of the voters of the district, in violation of Section 4 of Article XIII A of the California Constitution (Proposition 13).

The court of appeal held that since the Acts created agencies that were “special districts” within the meaning of Proposition 13, any tax ordinances that would have been adopted by the agencies pursuant to a simple majority vote would have been invalid. However, the Legislature had amended the Acts to authorize the agency to require approval by at least a two-thirds vote, as mandated by Proposition 13. The court of appeal therefore refused to declare the Acts void in their entirety, instead limiting relief to a declaration that a tax adopted pursuant to the Acts would be valid only if approved by a two-thirds vote. *Howard Jarvis Taxpayers’ Association v. State Board of Equalization* (1993) 20 Cal.App.4th 1598.

Tax on Sales of Materials and Fixtures to Federal Construction Contractors is Constitutional

In a bankruptcy proceeding, the Board filed a claim for sales and use taxes due on sales of materials and fixtures to a construction contractor improving real property under contracts with the U.S. Government. The U.S. District Court allowed the claim.

The U.S. Court of Appeals, Ninth Circuit, affirmed. The court held that the Sales and Use Tax Law did not discriminate against federal contractors because the legal incidence of the taxes fell on the contractor, not the United States, and the contractor had the opportunity to pass on the economic burden of the taxes to the United States. The court also held that Revenue and Taxation Code sections 6007.5 and 6384 provided statutory authority for the Board’s Regulation 1521, which classified the federal contractor as a consumer of materials and fixtures, because the statutes tax the sales by suppliers to federal contractors as retail sales.

Finally, the court held that there was a rational basis for the state to distinguish between federal contractors and other sellers who sell property to the United States, because the use of property in a construction contract by attaching it to realty changes the form of the property. *In re Howell* (9th Cir. 1984) 731 F.2d 624.

Redevelopment Agency May Constitutionally Impose Sales and Use Taxes

Under 1981 legislation (SB 152, Chapter 951, Statutes 1981), which authorized redevelopment agencies to impose local sales and use taxes in redevelopment areas if the city credits those taxes against its own sales and use taxes, a redevelopment agency sought a writ of mandate to compel its secretary to publish the ordinance imposing the taxes.

The California Supreme Court issued the writ of mandate. The court held that the ordinance did not violate Article XIII A of the California Constitution, which requires “special taxes” to be approved by two-thirds vote of electors, because the agency was not empowered to levy real property taxes and was therefore not a “special district” within the meaning of Article XIII A. The court also held the ordinance did not violate Article XIII B of the California Constitution, which limits local government appropriations to the past year’s level, because there was a transfer of the responsibility of providing services from the city to the redevelopment agency. The city and the agency could adjust their appropriations limit accordingly. *Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100.

I

A Sale Occurs when a Commencing Partnership Assumes the Liabilities of Its Partners in Exchange for Tangible Personal Property

The taxpayers formed a partnership and transferred assets to the partnership, including tangible personal property. The partnership assumed the liabilities of the taxpayers. The issue was whether the partnership’s assumption of liabilities was consideration for the assets transferred to the partnership.

The court of appeals held that assumption of liabilities is consideration, and therefore, a sale occurred. Under Regulation 1595(b)(4), the transaction was subject to tax. *Industrial Asphalt v. State Board of Equalization* (1992) 5 Cal.App.4th 1237.

Sales Made by Nonprofit Religious Organization in the Course of its Free Exercise of Religion subject to Use Tax

Plaintiff, a nonprofit religious corporation exempt from federal and state income taxation, conducted religious seminars throughout the United States. In addition to charging a fee for the seminar, a separate fee was charged for printed syllabus notebooks used to help follow the seminar, and they were only available to individuals who attended the seminars. Plaintiff also sold religious books and pamphlets through the mail which were not directly related to the seminars. The Board assessed sales tax against plaintiff on the sale of syllabus notebooks and sales and use tax on the sale of other religious literature. After paying the taxes under protest, plaintiff applied for a refund on the grounds that the distribution of the syllabus notebooks to seminar participants was incidental to the rendition of seminar services, notwithstanding a separately stated charge, and that the imposition of sales and use taxes upon the sale of religious literature was a violation of the free exercise clause of the United States Constitution.

The Court of Appeal held that the application of the state sales tax law to plaintiff’s activities was constitutionally infirm. The court held that the sales tax law operated as a privilege or occupation tax imposed upon the privilege

of selling tangible personal property at retail, and that the state's interest in raising revenue thereby could not justify such a tax as a condition of engaging in constitutionally protected activity, i.e., the sale of religious materials. [But see *Jimmy Swaggart Ministries v. Board of Equalization of California* (1990) 493 U.S. 378; 107 L.Ed.2d 796.] It held, however, that, plaintiff was liable for use taxes due with respect to its sales under Revenue and Taxation Code sections 6202 and 6203. *Institute in Basic Youth Conflicts, Inc. v. State Board of Equalization* (1985) 166 Cal.App.3d 1093.

Keypunch Activities are Subject to Tax

Customers delivered raw data to taxpayer, a computer service bureau, with instructions to transpose the data onto cards that could be read by the customer's computer. After the cards were read by the computer they were of no further use to the customer and were usually destroyed or recycled.

Taxpayer purchased the cards and paid the tax on them. Taxpayer considered the consumption of the cards to be part of the hourly rate it charged its customers for the keypunching and did not bill a separate amount for the cards. The cost of the cards constituted 2 percent of the overall cost to the customer.

Taxpayer filed a claim for refund for tax paid to the Board on the gross receipts from the keypunching activities. At trial, the court ruled that taxpayer was not entitled to a refund.

On appeal, taxpayer contended that the gross receipts from the sale of keypunching services are exempt from sales tax because the true object of the transactions between taxpayer and its customers is the service rendered, not the media on which the services are delivered.

The appellate court concluded that taxpayer's keypunching activities produced tangible personal property to the special order of its customers, and was subject to tax pursuant to Section 6006(f) of the Revenue and Taxation Code. *Intellidata Incorporated v. State Board of Equalization* (1983) 139 Cal.App.3d 594.

Lease Tax Law Exempts Prior Leases Only if Parties are Unconditionally Bound

A lessor sued the Board to recover taxes paid on lease receipts from lease agreements between plaintiff and various banks and insurance companies constitutionally exempt from use tax liability during the effective period of former Revenue and Taxation Code Section 6006.3(b). The Board had construed the statute as providing for taxation of receipts of leases originally executed after the effective date, and renewals of existing leases after the effective date. The Supreme Court held that the Board's construction of the statute was proper in light of the statute's language, the purpose of the Legislature, and the legislative history of the statute and related enactments. The court adopted the Board's interpretation that a renewal after August 1,

1965 of leases executed before that date subjects these leases to sales tax. The court further held that the extension of the leases by failure to exercise a power of termination rendered these leases subject to sales tax; that leases executed before August 1, 1965 for equipment installed after that date were exempt unless the rental price was altered; that leases with miscellaneous equipment changes after August 1, 1965 were exempt up to any additional rental charge attributable to the equipment change; and that leases derived from conditional orders from equipment placed before August 1, 1965, but not executed until after that date, were taxable. *International Business Machines v. State Board of Equalization* (1980) 26 Cal.3d 923.

J

Consumer Permitted to Include Board in Suit Against Retailer for Sales Tax Reimbursement Refund

On December 11, 1971, the U.S. Congress repealed the federal manufacturer's excise tax imposed on the sale of specified new motor vehicles and accessories retroactively to August 15, 1971, and required manufacturers to refund taxes collected during this four month period. The Board had promulgated a regulation that provided that repayment of the federal tax by the manufacturer to the consumer would be regarded as a price adjustment. Since the federal tax was originally included in the gross sales price by which sales tax was measured, the reduction in the federal tax resulted in a reduced measure of sales tax. A purchaser of a new automobile during the four-month period who was unable to obtain a refund of sales tax reimbursement he had paid brought a class action suit against his retailer and all California retailers of the product for refund of the excess sales tax reimbursement the retailers and paid to the Board.

The Board argued, and the court agreed, that the customers should not be allowed a direct cause of action against the Board; only a retailer who had paid the tax would have a direct cause of action. Instead, the court compelled defendant retailers to make refund applications to the Board, and required the Board to respond to these applications by paying into court all sums, if any, due defendant retailers. *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790.

Plaintiff Upheld in Consumer Class Action for Refund of Tax Reimbursement

Plaintiff, a consumer, purchased an automobile and paid sales tax reimbursement on the entire purchase price which included federal excise tax. The United States Congress later repealed the excise tax retroactively, resulting in a refund of that tax to plaintiff. Plaintiff brought a class action for all motor vehicle purchasers against all dealers, seeking to obtain refunds of all amounts of sales tax reimbursement paid with respect to the refunded federal excise tax. The Board was joined in the suit. The Supreme Court held

that the Board was a proper party to the suit in *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790. On remand, the Superior Court held that joinder of the Board in the suit tolled the three-year statute of limitations of Section 6902 of the Revenue and Taxation Code and that the Board must make the refunds to the dealers who would be required to pay over the money to the consumers who had paid excess tax reimbursement. The court also held that the amounts in question could not be used to offset other amounts owed by individual dealers to the Board. The court of appeal upheld the trial court on appeal by the Board. *Javor v. State Board of Equalization* (1977) 73 Cal.App.3d 939 (disapproved to the extent inconsistent with *Woosley v. State of California* (1992) 3 Cal.4th 758, which held that class claims for tax refunds were not authorized prior to 1989 legislative amendment to Revenue and Taxation Code).

The Federal Tax Injunction Act Requires Dismissal of Action to Prevent Assessment and Collection of Sales Tax

A corporation and its two shareholders were under investigation by the IRS Criminal Investigation Division when the Board issued an assessment for sales tax against the corporation. The corporation filed a petition for redetermination, requesting a hearing before the Board, but also requesting a stay of that hearing and all administrative proceedings until the criminal investigation was completed (the corporation's shareholders were later charged with federal crimes). The Board refused the request and set the hearing. Before that hearing, the corporation and the two shareholders filed a civil rights action for injunction and declaratory relief in federal district court. The district court held that the Tax Injunction Act (28 U.S.C. § 1341) deprived it of jurisdiction because there was an adequate state remedy. The Board thereafter held the hearing and issued a Notice of Redetermination.

The Court of Appeals held that the state provided an adequate remedy, and the hearing and administrative proceedings that plaintiffs sought to enjoin are an integral part of California's sales tax assessment and collection scheme. Thus, the court held that regardless of the basis for seeking the injunctive relief, the explicit language of the Tax Injunction Act divests jurisdiction from the US District Court. The court held further that the correct procedure is for plaintiff corporation to file a claim for refund before the Board and, if the criminal proceedings are still pending, again request the stay, raising its constitutional arguments. The court explained that if the Board declines to stay the action and denies the claim, plaintiffs would thereafter have an adequate remedy in state court. *Jerron West, Inc. v. California State Board of Equalization* (9th Cir. 1997) 129 F.3d 1334.

Sales Tax Applies to Sales of Religious Books, Tapes, and Records

Taxpayer was a religious organization that sold religious books, tapes, records, and other religious and nonreligious merchandise at crusades it conducted in California. The Board informed taxpayer that religious

materials were not exempt from sales tax, and requested taxpayer to register as a seller to facilitate reporting and payment of the tax. Taxpayer responded that it was exempt from such taxes under the First Amendment. The Board also asserted that taxpayer had sufficient nexus with the State of California to require it to collect and report use tax on its mail-order sales to California purchasers.

The U.S. Supreme Court held that California's generally applicable sales and use tax was not a flat license tax, which might operate as a prior restraint on the free exercise of religious beliefs. In addition, the sales and use tax represents only a small fraction of any retail sale and applies neutrally to all retail sales of tangible personal property made in the state. The court also found that the state's registration requirement does not act as a prior restraint on the exercise of religious beliefs, since no fee is charged for registering, the tax is due regardless of preregistration, and the tax is not imposed as a precondition of disseminating the religious message. The court found that, to the extent the imposition of a generally applicable tax decreased the amount of money taxpayer had to spend on its religious activities, that burden was not constitutionally significant. Since the collection and payment of the tax imposed no constitutionally significant burden on taxpayer's religious practices or beliefs, the court concluded that there was no violation of the Free Exercise Clause of the First Amendment.

The court also held that imposition and collection of the tax did not violate the Establishment Clause of the First Amendment. The tax has a secular purpose and neither advances nor inhibits religion, and California's imposition of the tax on taxpayer threatened no excessive entanglement between church and state. The imposition of sales and use tax does not require the state to inquire into the religious content of the items sold or the religious motivation for selling or purchasing the items, because the materials are subject to the tax regardless of content or motive.

Finally, the court refused to consider the merits of taxpayer's claim that the imposition of use tax liability on it violated the Commerce and Due Process Clauses of the U.S. Constitution because, as an out-of-state distributor, it had an insufficient "nexus" with California. The court found that taxpayer failed to properly raise this argument in its refund claim before the Board. *Jimmy Swaggart Ministries v. Board of Equalization of California* (1990) 493 U.S. 378; 107 L.Ed.2d 796.

Smog Impact Fee is Unconstitutional

The Legislature adopted the Smog Impact Fee as part of the Sales and Use Tax Law in Revenue and Taxation Code sections 6261 through 6263. This fee, in the amount of \$300, was imposed upon the registration of a vehicle last registered outside this state, unless the vehicle was "California certified." The fee was imposed even though the vehicle would have to pass

the biannual smog test as a condition of registration. The Court of Appeal held that the Fee was unconstitutional under the Commerce Clause of the United States Constitution and also violated Article XIX of the California Constitution. *Jordan v. Dept. of Motor Vehicles* (1999) 75 Cal.App.4th 449.

Arbitration Award Limited to \$18.194 Million

Revenue and Taxation Code Section 6909 (b) implicitly contained a cap of \$18.194 million in attorneys' fees and costs. At the time this section was enacted, the state had appealed a trial court judgment for this amount but the plaintiffs had not. Any arbitration award greater than this amount would be an unconstitutional gift of public funds. *Jordan et al. v. Department of Motor Vehicles et al.* (2002) 100 Cal.App.4th 431.

K

“Primary Purpose” Test Found Valid in Determining Taxability of Raw Materials Used in Manufacturing Process

Plaintiff, a manufacturer and producer of steel, pig iron and other products, purchased certain materials to charge its furnaces and remove impurities from the molten metal. The removal of impurities is accomplished by combining them with the materials to form slag. Portions of the materials were incorporated into the steel to achieve a specific quality; portions incidentally remained in the finished steel; portions were dissipated or lost in the manufacturing process; and portions became components of the slag. An independent company, which removed the slag and reprocessed it, paid plaintiff 1 cent for each ton removed and a 10 percent royalty on the net sales price of the reprocessed slag. After plaintiff either paid sales tax reimbursement on the materials or purchased them under a resale certificate and later paid use tax, it filed a claim for refund with the Board. The Board's position was that plaintiff purchased the materials for a purpose other than resale, namely to aid in the manufacture of steel. Plaintiff argued that the materials were properly purchased for resale in the form of slag, a by-product in the manufacture of steel.

The Supreme Court, relying on Sales and Use Tax Regulation 1525 and the applicable Sales and Use Tax Annotations, upheld the trial court's finding that plaintiff's "primary purpose" for purchasing the raw materials determines the application of tax. The court found the Board's conclusion that plaintiff purchased the materials to aid in manufacturing steel was reasonable, and held that if property is purchased as an aid in the manufacturing process, it is taxable despite some portion remaining in the finished product or an incidental waste or by-product results. *Kaiser Steel Corporation v. State Board of Equalization* (1979) 24 Cal.3d 188.

Contract for Construction of Electrical Power Transmission Line Taxable as a “Construction Contract”

Taxpayer had been assessed tax on its labor charge in erecting and fastening electrical power transmission lines to towers furnished by the power authority and installed by the contractor, and on charges for conductors, insulators, and hardware supplied by taxpayer. The Board, relying on ad valorem property tax rulings, characterized the line as “tangible personal property,” and thus regarded the labor as taxable “fabrication labor” under Revenue and Taxation Code Section 6006(b), which provides that “sale” includes the fabrication of tangible personal property for a consumer who furnishes the materials.

The court found the Board’s reliance on the property tax provisions to be misplaced, since there was no relationship between the property tax and sales tax provisions. In affirming the trial court’s decision that tax applied to the tangible components but did not apply to that portion of the contract price attributable to labor, the court held that the transaction in question did not have the statutory characteristics of a “sale” but was taxable as a “construction contract” under regulation 1521. Tax was thus inapplicable to the contractor’s labor charges. The court also held that taxpayer’s defense of limitations was untimely, since the defense was not raised in taxpayer’s claim for refund filed with the Board. Further, the facts did not establish an estoppel against the Board with respect to the application of interest and penalties, since the Board consistently took the position that the transaction was taxable as a “sale.” *King v. State Board of Equalization* (1972) 22 Cal.App.3d 1006.

Related Corporation Subject to Liability as Successor

Taxpayer had made substantial sales on credit to a debtor corporation which subsequently became unable to remain current in its obligations. To avoid a loss, taxpayer acquired ownership of the outstanding stock of the debtor corporation and then directed the debtor corporation to transfer its operation assets to a wholly-owned subsidiary of taxpayer. The subsidiary issued a promissory note to taxpayer equivalent to the value of the assets which it received. Taxpayer then credited the debtor corporation, as reduction of its indebtedness, in the amount of the note.

An audit of the debtor corporation disclosed additional taxes due on sales made prior to its liquidation into the subsidiary. The amount was assessed against the subsidiary, as successor, by authority of Section 6812 of the Revenue and Taxation Code which imposes a liability upon any “purchaser of a business [who] fails to withhold purchase price” sufficient to cover any amount owed by the seller of the business under the Sales and Use Tax Law. The court, in holding that the subsidiary was properly liable for tax liabilities of the debtor corporation arising prior to the transfer of the assets, concluded that the fact that the purchase price did not flow directly to the seller was immaterial, noting that to hold otherwise would permit a taxpayer to avoid

liability by the simple device of having the purchase price paid through an intermediary. Further, in the circumstances of present day business practice, it would be illogical to hold that a “purchase price” must take the form of cash or tangible personal property. *Knudsen Dairy Products Co. v. State Board of Equalization* (1970) 12 Cal.App.3d 47.

1396.2
2003-3

SALES AND USE TAX COURT DECISIONS

Statutory Procedure for Refund of Unconstitutionally Imposed Sales Tax is Valid

In *Rider v. County of San Diego* (1991) 1 Cal.4th 1, the Supreme Court declared unconstitutional the San Diego County Regional Justice Facility Financing Agency supplemental sales and use tax (Jail Tax) because it was not approved by at least two-thirds of San Diego's voters as required under Article XIII A, section 4 of the California Constitution. Plaintiff thereafter filed this consumer class action lawsuit seeking direct reimbursement plus interest to consumers who effectively paid the Jail Tax. During the pendency of this action, the Legislature adopted SB 263 (codified as Revenue and Taxation Code Section 7275 et seq.) which provides a scheme for refunding the illegally collected tax. Three days after the trial court entered judgment for the plaintiff, SB 263 became effective.

The court of appeal held that the legislative scheme for refunds displaced the trial court's refund plan, and that such displacement did not violate the separation of powers doctrine. *Kuykendall v. State Board of Equalization* (1994) 22 Cal.App.4th 1194.

L**Board Classification of Drapes as Tangible Personal Property Upheld**

Plaintiff, who sold and installed custom drapes to builders of apartment houses pursuant to lump-sum contracts, sought a refund of tax. Tax had been assessed on the basis that the drapes were tangible personal property, with the tax being measured by the total sales price. Taxpayer asserted that the drapes were fixtures, in which case only the cost of the material used in the drapes would be subject to tax. The trial court classified the drapes as fixtures, ignoring the classification made by the Board.

On appeal, the court held that the trial court had no authority to disregard the Board's classification of the drapes as tangible personal property in the absence of a finding that the classification was arbitrary or capricious, or had no reasonable or rational basis. The trial court had made no such finding, nor could it have done so in light of the testimony at the trial. The court held that plaintiff had failed to carry its burden of proof that the classification was unreasonable. The uncontradicted evidence supported the conclusion that there was a reasonable basis for the Board's classification. The trial court was thus directed to enter judgment for the Board. *L. A. J., Inc. v. State Board of Equalization* (1974) 38 Cal.App.3d 549.

Revenue and Taxation Code Section 6006(g)(5) Not Discriminatory

On August 1, 1965, the definition of "sale" in the Sales and Use Tax Law was extended to include the lease of property rented in a form substantially different from that acquired by the lessor [Rev. & Tax Code Sec. 6006(g)(5)]. Taxpayer thereafter paid a "use" tax measured by his receipts from the rental of powered houseboats constructed prior to August 1 of materials on which

he had previously paid sales or use tax. Taxpayer sought a refund of the amounts paid by him subsequent to August 1, 1965, contending, on appeal, that Section 6006(g)(5) discriminated upon lessees who leased property in a different form from that in which it was acquired by the lessor.

The court of appeal held that there was a rational basis for the distinction drawn by the challenged section. Since the labor cost would not otherwise be includable within the measure of sales and use tax, the Legislature could properly conclude that the rental to the lessee, and not the cost of tangible items to the lessor, was the amount most likely to result in a measure of tax equitable with that paid by others under the statutory scheme. *Ladd v. State Board of Equalization* (1973) 31 Cal.App.3d 35.

Tax does Not Apply to Special Test Equipment Purchased by Defense Contractors

Plaintiffs, two defense contractors, sought a refund of tax assessed on special test equipment which they had acquired or manufactured and stored on their premises pursuant to defense contracts with the United States government. Under the terms of the contract, title to the equipment passed to the federal government as soon as it was ready for use. The Board, in imposing the tax, relied upon Sales Tax General Bulletin 57-22 which provided that tax applied to test equipment which is used successively to test end products during and after the manufacturing process, and which is not built into the end product, or is not itself the end product called for by the contract.

The court of appeal affirmed the Superior Court's judgment for plaintiffs, holding that plaintiffs purchased the special test equipment for resale and resold it to the federal government. Such a sale is exempt from tax. Any use or storage thereafter was not that of plaintiffs, but of the federal government in which title immediately vested. There was, therefore, no basis upon which to assess plaintiffs tax on the equipment. *Lockheed Aircraft Corporation v. State Board of Equalization* (1978) 81 Cal.App.3d 257.

Actual and Not Estimated Fuel-Usage Figures Determine Tax Liability

When plaintiff purchased fuel for its steamship common carrier operations, it claimed an exemption under Revenue and Taxation Code section 6385 with respect to fuel it estimated would not be used to reach its first out-of-state destinations. It did not issue corrected bills of lading to reflect the actual fuel used to reach its first out-of-state destinations, as required by Regulation 1621. Since plaintiff relied on estimates, sometimes the fuel usage to reach the first out-of-state destination, which was taxable, was greater than the estimate, and sometimes it was less than the estimate. This means that tax was sometimes overpaid with respect to the sales to plaintiff, and sometimes was underpaid.

The Board assessed tax with respect to the underpayments of tax, but did not offset the overpayments of tax, because plaintiff had not issued corrected bills of lading as required by Regulation 1621. Plaintiff argued that estimated bills of lading were authorized. The court of appeal agreed with the decision in *Delta Air Lines, Inc. v. State Board of Equalization* (1989) 214 Cal.App.3d 518, and held that corrected bills of lading were required in order to qualify for the exemption. Section 6385 and Regulation 1621 require that the tax be paid with respect to fuel actually consumed by a carrier to reach its first out-of-state destination. Although carriers were authorized by Regulation 1621 to issue estimated bills of lading “to begin with,” they were required to issue corrected bills of lading within the time period specified in the regulation in order to complete qualification for the exemption. Since plaintiff had not done so, the court of appeal held in favor of the Board. *Lykes Bros. Steamship Co., Inc. v. State Board of Equalization* (1994) 23 Cal.App.4th 1421.

Drop Shipment Rules of Revenue and Taxation Code Section 6007 Upheld

Plaintiff supplied property from its California location to out-of-state retailers. The out-of-state retailers, who were not engaged in business in California, instructed plaintiff to deliver the property directly to the out-of-state retailers’ customers in California (that is, to “drop ship” the property). The Board regarded the transactions as coming within the second paragraph of Revenue and Taxation Code section 6007 and therefore assessed sales tax against plaintiff as the retailer of the property.

The Court of Appeal held that the drop shipment rule of section 6007 is an alternative definition of “retail sale,” and that under section 6091 a seller must overcome the presumption that its sale is at retail, including a “retail sale” as defined by the drop shipment rule. The court also held that the drop shipment rule is valid and constitutional. *Lyon Metal Products, Inc. v. State Board of Equalization* (1997) 58 Cal.App.4th 906, cert. den. (1998) 524 U.S. 916; 141 L.Ed.2d 158.

M

Transfer of Entire Division’s Assets and Liabilities to Existing Subsidiaries is Not a Sale where Transferor Remains Jointly Liable for Liabilities

The company transferred both the assets and liabilities of three divisions to three of its already existing wholly-owned subsidiaries. It, however, remained jointly liable with the subsidiaries for those liabilities. The Board assessed sales tax on the transfer of assets, and the consideration for the sales was the assumption of the liabilities by the existing subsidiaries.

Taxpayer contended: (a) this was a nontaxable corporate reorganization, and (b) there was no taxable consideration because taxpayer remained jointly liable for the liabilities.

The court of appeal held in favor of the taxpayer, stating that the taxpayer and its subsidiaries were separate entities, and the transfers between them, which constituted sales, would be subject to sales tax. However, the court also held that where the taxpayer remained jointly liable for the indebtedness assumed by the subsidiaries, and the subsidiaries were pre-existing (not commencing) corporations, the taxpayer received no consideration for the transfer of assets, and there was, therefore, no sale. *Macrodyne Industries, Inc. v. State Board of Equalization* (1987) 192 Cal.App.3d 579 [disapproved in *Beatrice Co. v. State Board of Equalization* (1993) 6 Cal.4th 767].

Taxpayer Held Not Subject to Tax on Transactions with Related Corporation

Plaintiff was a corporation wholly owned by WED Enterprises, Inc. (WED) which in turn was wholly owned by Walt Disney Productions (Productions). Plaintiff manufactured devices designed by WED using materials furnished by Productions. Plaintiff's services were performed solely for Productions and another related corporation. Productions retained title to all materials, ideas, and completed devices. The officers of plaintiff were on the payroll of WED. Productions and WED took care of plaintiff's payroll, purchasing, accounting functions, and insurance coverage. Plaintiff recorded no profits. A long-time employee of Productions, who was carried on the payroll of WED, supervised the day-to-day operations of plaintiff. Plaintiff was formed solely to facilitate union agreements, and was in existence for only a few years. Before it was formed, and after it was dissolved, the same operations were carried on through a division of Productions.

The issue was whether plaintiff's services constituted "sales" within the meaning of Section 6006(b) of the Revenue and Taxation Code, which provides that "sale" includes producing, fabricating, or processing tangible personal property for a consideration for consumers who furnish the materials used.

On the particular facts involved, the court concluded that Productions was fabricating items for itself through its employees in fact, and therefore no sales tax was payable. *Mapo, Inc. v. State Board of Equalization* (1975) 53 Cal.App.3d 245.

The Depreciation of Property Held For Resale Is A Taxable Use

Taxpayer held a seller's permit and was engaged in the business of buying, breeding, and selling horses. Taxpayer held twenty horses for resale during the period July 1, 1969 to December 31, 1971 consisting of one "teasing stallion" and nineteen mares. Each mare was bred while being held for resale and was either in foal or with a foal at its side. Although taxpayer contended that breeding the mares was not a use inconsistent with the holding of them for resale and hence subject to use tax, it capitalized the mares on both its federal and state income tax returns.

The court of appeal held that breeding the mares was a reasonable incident to the sale and was not a use incompatible with the requirement that the mares be held only for demonstration or display. The court did, however, find that taxpayer's depreciation of the mares on its federal and state income tax returns evidenced an intent to use the animals other than for retention, demonstration, or display. The court further found that resale inventory is not ordinarily subject to a depreciation allowance as a capital asset for income tax purposes. Accordingly, the court upheld the use tax. *McConville v. State Board of Equalization* (1978) 85 Cal.App.3d 156.

Sales of Aircraft Parts to a Mexican Airline were Tax Exempt Exports

The taxpayer sold aircraft parts to Aeromexico to service Aeromexico's airplanes. Aeromexico received the parts at the taxpayer's Long Beach plant and shipped them by U.S. common carriers to the U.S.-Mexican border at San Ysidro, California. AM MEX International, a forwarding agent, processed them through U.S. and Mexican customs. After a 48-hour customs delay, the parts were loaded onto Mexican common carriers and shipped to Aeromexico's Mexico City maintenance facility. Mexican law prohibited U.S. common carriers from operating in Mexico, and U.S. law permitted Mexican common carriers to operate in the U.S. only in the immediate border area.

The court determined that the sales were tax-exempt exports. Aeromexico's clear plan to ship the parts to Mexico City for its own use was acted upon, and continued uninterrupted until completion, except for unavoidable delays incidental to their journey. *McDonnell Douglas Corporation v. State Board of Equalization* (1992) 10 Cal.App.4th 1413.

Gross Receipts from the Furnishing of Telephone Paging Devices Not Subject to Sales and Use Taxes when Provided in Conjunction with the Sale of Telephone Paging Services

Taxpayer was assessed sales tax on the sale of telephone paging devices supplied to customers of their telephone paging services. There was no separately listed charge for the devices.

The court determined that although sales and use taxes are imposed on the gross receipts from the sale of tangible personal property (Revenue and Taxation Code Section 6051), and a "sale" includes the "leasing" of tangible personal property (Section 6006(g)), Regulation 1501 recognizes that services are exempt. It is possible to provide tangible personal property that is only incidental to the primary service agreement without incurring a sales or use tax.

The issue to be decided was whether the paging devices were only incidental. The test for determining whether a business activity is a service or whether it is a sale of tangible personal property depends upon the "true object" of the transaction. The court held that the true object of this contract

was the providing of paging services. The paging devices were only incidental thereto. A major factor was that taxpayer retained ownership of the paging devices and was responsible for their maintenance and repair. The customer paid a flat fee, with no separate charge for the use of the paging device. *MCI Airsignal, Inc. v. State Board of Equalization* (1991) 1 Cal.App.4th 1527.

Tax Due on Vehicles Purchased by Subsidiary from Parent Corporation

A Delaware corporation that was a wholly-owned subsidiary of a German corporation was authorized to do business in California. It brought an action against the State Board of Equalization to recover use taxes paid on vehicles purchased from the parent corporation and another subsidiary. The trial court entered judgment in favor of the Board.

The court of appeal affirmed, rejecting plaintiff's contention it was denied equal protection of the law by being subjected to the tax on the basis of the price paid for the vehicles under section 6244 of the Revenue and Taxation Code and Sales and Use Tax Regulation 1669, while a California merchant that is merely a subdivision of a manufacturer, rather than a separate corporation, is taxed on the basis of the cost of the manufacturer's raw material. The court held there is a significant difference between wholly-owned but separate corporations, and divisions of a single corporation, and that if a business elects to use the device of separately incorporated wholly-owned subsidiaries in order to obtain the advantages of separate corporate entities, it must also suffer whatever disadvantages attach to that election. *Mercedes-Benz of North America, Inc. v. State Board of Equalization* (1982) 127 Cal.App.3d 871.

Classification of Glacé Fruits as "Candy or Confectionery" Upheld

Under Revenue and Taxation Code Section 6359 as it was operative prior to January 1, 1972, "candy and confectionery" was excluded from the definition of "food products," the sale of which generally is not subject to tax. By regulation, the Board had defined "candy and confectionery" to include "candied fruits, crystallized fruits and glacé fruits [and] preparations of fruits . . . in combination with . . . sugar." Plaintiffs, taxpayer and its predecessor, were assessed tax resulting from the sale of their glacé fruit products. Plaintiffs contended that the regulation was invalid, as inconsistent with Section 6359, or, alternatively, that their products were not properly classified as "candy or confectionery" but as "fruit and fruit products" or "sugar and sugar products," items which were specifically classed as "food products" by Section 6359.

The court of appeal observed that the construction of a statute by officials charged with its administration is entitled to great weight and if there appears to be some reasonable basis for the classification, a court will not substitute its judgment for that of the administrative body. The court held (1) that the Board's administrative ruling was reasonable and valid, since it was

supported by the dictionary definition of “confectionery,” the Legislature had frequently amended the statute without attempting to modify the administratively made definition of the phrase in question, and no one had previously challenged the Board’s longstanding interpretation; and (2) that the evidence supported the classification of plaintiffs’ products as “candy or confectionery” since after processing, approximately 80 percent of the product was sugar. *Mission Pak Co. v. State Board of Equalization* (1972) 23 Cal.App.3d 120.

Supplies Consumed in Repairs

Taxpayer sold supplies such as sandpaper, masking tape, and paint thinner to auto repair shops for use during repairs. Taxpayer did not report sales tax on its sales of such supplies, contending that the sales were for resale, citing in support that some of the repair shops invoiced their customers a separate line item for “paints and materials” which was intended to cover the costs of paints and supplies used and consumed in the repair process. The court noted that the repair shops did not furnish the supplies to their customers, and thus concluded that they consumed the supplies in the process of making the repairs and did not purchase the supplies for resale. *Modern Paint & Body Supply, Inc. v. State Board of Equalization* (2001) 87 Cal.App.4th 703.

The Imposition of a Sales Tax by the Monterey County Public Repair and Improvement Authority after Approval of the Tax by a Simple Majority of the Voters Violated Proposition 13

Revenue and Taxation Code section 7285.5 authorizes rural counties to create agencies that can impose sales taxes for specific purposes with the approval of two-thirds of the agencies’ members and a simple majority of the voters. Pursuant to this law, the Monterey County Board of Supervisors created the Monterey County Public Repair and Improvement Projects Authority.

On August 9, 1989, the Authority passed a sales tax ordinance to become effective upon approval by a majority of the voters. Under the ordinance, the Authority would collect and deposit tax revenues in its general fund and then use specified amounts on 27 improvement and repair projects previously enumerated by the County Board of Supervisors. The tax ordinance was approved by a simple majority of the voters.

The tax was challenged by the Monterey Peninsula Taxpayers Association. Relying upon *Rider v. County of San Diego* (1991) 1 Cal.4th 1, the court of appeal held that the tax violated article XIII A, section 4 of the California Constitution, commonly known as Proposition 13, which allows the imposition of special taxes by special districts only if the tax is approved by at least two-thirds of the voters. The court of appeal also held that its ruling would be applied retroactively, not prospectively. *Monterey Peninsula Taxpayers Association v. County of Monterey* (1992) 8 Cal.App.4th 1520.

Board Could Establish Retail Price by Using Plaintiff's Records

A construction contractor which constructed and installed specialized elevator systems brought an action to recover a portion of the sales taxes it had paid under a lump sum contract which included installation of the system as a part of the building. The tax had been imposed on the sales price for which tangible personal property was sold, excluding the amount charged for labor and services rendered in installing the property. The Board used plaintiff's bid sheets in calculating all anticipated contract costs and profits in determining the "retail price" of self-manufactured components on which the sales tax was assessed, and the trial court upheld that determination. As to electrical switching and controlling devices plaintiff purchased and assembled, the trial court agreed with plaintiff's contention that labor or service supplied by plaintiff was to be considered as labor or service required for the creation of a structure on land and not subject to the imposition of any sales tax, and ordered a refund.

The court of appeal reversed with instructions to enter judgment for the Board. The court held that the trial court was correct in denying any refund with respect to the self-manufactured components. As to the electrical switching and controlling devices, the court held it was not unreasonable for the Board to establish a sales price for those assembled components by taking into consideration the service costs incurred by plaintiff at its central facility, or to rely on the bid sheets and other records of plaintiff to establish a realistic "sales price" for those assemblies. Accordingly, the court held that that portion of the judgment awarding plaintiff a refund was erroneous. *Montgomery Elevator Company v. State Board of Equalization* (1981) 118 Cal.App. 887.

Border Stores Not Required to Collect Tax from California Customer where Sale and Delivery Take Place Outside California

Plaintiff was an Illinois corporation with a nationwide retail sales business. It maintained a regional administrative office in Oakland, California, for a region which encompassed its stores in Reno, Nevada and Klamath Falls, Oregon.

The Board required plaintiff to collect use tax with respect to over-the-counter credit sales made to California residents at its stores in Nevada and Oregon where delivery was made to the California customers at the Nevada and Oregon locations. Plaintiff had not collected use tax with respect to such sales even though its credit files indicated that the customers had California addresses.

The court of appeal held that since there was no relationship between the retailer's general activities in California and the generation of sales by its border stores, and since the border stores received no opportunities, protection, or benefits from California that were sufficient to allow California to burden sales to its residents completed outside its jurisdiction,

the due process clause of the fourteenth amendment of the U.S. Constitution precluded California from requiring that plaintiff collect the use tax on over-the-counter cash or credit sales made at its Nevada and Oregon stores.

The court also concluded that the purchaser and the retailer could properly object to the imposition of the use tax with respect to sales in Nevada as violating the commerce clause of the U.S. Constitution because there was no credit given against use tax liability for sales tax paid in Nevada. The court concluded purchasers and retailers in Oregon, however, could not properly make the same objection to imposition of the use tax because there was no risk of multiple taxation—Oregon had no sales tax.

1404.2
2002-1

SALES AND USE TAX COURT DECISIONS

The use tax collection duty was held to violate the commerce clause with respect to sales in Oregon and Nevada because California contributed nothing to the sales at issue but the home residence of the purchasers. This contribution was not sufficient to support the burden of use tax collection.

The court further held that the imposition of the use tax collection duty on out-of-state stores of multi-state retailers, but not on out-of-state stores of local merchants, was inherently discriminatory and denied plaintiff equal protection and uniform operation of the law as provided in the United States and California constitutions. *Montgomery Ward & Co. v. State Board of Equalization* (1969) 272 Cal.App.2d 728, cert den., 396 U.S. 1040.

N

Modification Work Which Becomes a Component Part of an Airplane Leased by Common Carrier is Not Exempt from Tax

Plaintiff engaged in the business of leasing transport category aircraft. Plaintiff and one of its common carrier lessees agreed that a leased aircraft would be modified to increase its load carrying capacity and engine power. The modification work was performed by a separate firm. The engines were removed from the airplane, delivered to the repair firm, and reinstalled when the modification was completed. The Board taxed the modification and tax was paid by the repair firm. Plaintiff reimbursed the repair firm for the amount of tax and the repair firm assigned its refund claim to plaintiff. After denial of the claim by the Board, plaintiff sought recovery in Superior Court on the basis that the modification work should be considered exempt as a sale, use, or other consumption of aircraft provided to common carriers pursuant to Revenue and Taxation Code Sections 6366 and 6366.1(a). The court of appeal held that Sections 6366 and 6366.1(a) do not exempt the gross receipts from the sale in this state of tangible personal property thereafter becoming component parts of aircraft which have already been sold, leased, or sold for the purpose of leasing, to persons using such aircraft as common carriers of persons or property. The engine modifications performed on the aircraft owned by plaintiff were therefore properly subject to tax. *National Aircraft Leasing, Ltd. v. State Board of Equalization* (1979) 90 Cal.App.3d 549.

Mail Order Vendors Liable for Collection of Use Tax if They have Offices in California, Even if the Activities Conducted at Those Offices are Unrelated to Mail-Order Sales

Plaintiff distributes magazines to subscribers within California and also sells maps, atlases, globes, and books by mail order to California consumers. Plaintiff maintains two offices in California for the purpose of soliciting advertising in the magazine. During a portion of the period in question, sales of the maps, atlases, globes, and books were also made from these offices, but during the remainder of the period, the activity of the offices was limited

to solicitation of advertising. The Board collected use tax from plaintiff for the mail order sales on the basis that the plaintiff was liable for tax that it should have collected from its California customers. Plaintiff then sued for a refund of these amounts on the basis that the requirement for it to collect use tax on its sales to California residents was a violation of due process and an unconstitutional burden on interstate commerce, particularly since the offices maintained in the state were not associated with the sales of its products within the state for a portion of the period.

The California Supreme Court upheld the Board, basing its decision on the principle that where a state has given something for which it may ask a return, the requirement for collecting use tax is not unconstitutional. The court ruled that where an out-of-state seller conducts a substantial mail order business with residents of this state, and the seller's connection with the state is *not* exclusively by means of interstate commerce, the slightest presence of the seller within the state independent of the interstate commerce connection will permit the state constitutionally to impose on the seller the duty of collecting the use tax from mail order purchasers and the liability for failure to do so. The court stated that the mail orders were part of the plaintiff's business in California and rejected as of no constitutional significance its claim that its in-state activities are "dissociated" from its mail order activities. The United States Supreme Court affirmed, but made it clear that it did not necessarily agree with the California Supreme Court's "slightest presence" standard of constitutional nexus. The U.S. Supreme Court held that National Geographic's maintenance of two offices in California, and solicitation by employees of advertising copy in the range of \$1 million annually, establish a much more substantial presence than the expression "slightest presence" connotes. *National Geographic Society v. State Board of Equalization* (1977) 430 U.S. 551, 51 L.Ed.2d 631.

Use Tax on Railroad Passenger Cars Discriminated Against Rail Carrier

The National Railroad Passenger Corp. (Amtrak) purchased 15 railroad passenger cars which were first used in California. The Board assessed use tax of \$978,000 against Amtrak on these purchases. Amtrak contended that the Federal Railroad Revitalization and Recovery Act, which prohibits any state tax which discriminates against a rail carrier, barred imposition of the use tax on Amtrak. Amtrak further argued that since the California use tax does not apply to purchases of commercial passenger aircraft, commercial passenger watercraft, or rail freight cars, it should not apply to purchases of railroad passenger cars.

The United States District Court for the Northern District of California held in favor of Amtrak. The court held the use tax was discriminatory under the federal Act, and that the Act did not require that a rail carrier must show it is in competition with other types of passenger carriers whose purchases are exempt from tax. Also, the tax was not *de minimis*, since the amount

assessed was almost \$1 million, and the tax would apply to all railroad passenger cars first used in California. *National Railroad Passenger Corp. v. California State Board of Equalization* (1986) 652 F.Supp. 923.

Transfers of Drawings and Designs, Manuals and Procedures, and Computer Programs are Taxable Sales of Tangible Personal Property

One corporation sold all of the assets of its solar division to another corporation. At the time of the sale, the corporations agreed to allocate the purchase price among the various assets to be transferred. The assets that were the subject of the tax dispute in this case fell into three categories: drawings and designs, manuals and procedures, and computer programs. The Board determined that the assets constituted tangible personal property, and that their sale was subject to sales tax. The corporations filed an action for refund in superior court, and the court ruled in favor of the Board. After the Court of Appeal affirmed the trial court's judgment, the California Supreme Court granted review.

Plaintiffs argued that with respect to sales of the drawings and designs, and the manuals and procedures, the objective of the purchaser was primarily to acquire the intellectual content embodied in the physical objects, not to acquire the objects themselves. Thus, plaintiffs contended, the transfer was not a sale of tangible personal property, so it was not subject to sales tax. With respect to the computer software, plaintiffs argued that it was "custom" software, and therefore was not taxable. The Supreme Court affirmed the judgment of the Court of Appeal, holding that the sale of drawings and designs, and manuals and procedures, constituted a taxable sale of tangible personal property. The sale of the documents was not excluded from tax as being incidental to the performance of a service under Regulation 1501; the sale was subject to tax regardless of the fact that the documents were not physically useful in the manufacturing process; and the characterization of the documents as intangibles for federal tax purposes was not determinative of characterization for sales tax purposes. The court also held that the computer programs did not qualify as custom computer programs. Although they were initially developed on a custom basis, the subsequent sales were taxable sales of prewritten programs, not of custom computer programs as defined in Revenue and Taxation Code section 6010.9. *Navistar Internat. Transportation Corp. v. State Board of Equalization* (1994) 8 Cal.4th 868.

Exempt Lease of Mobile Transportation Equipment does Not Include Transfer of Ownership of Vehicles Already Leased

Taxpayers were motor vehicle leasing companies that acquired mobile transportation equipment from other leasing companies. Taxpayers assumed the outstanding leases on the equipment, and also assumed the transferors' unpaid obligations to their lenders for the equipment.

The Board determined use tax on the purchases, measured by the amounts owed on the loans. Taxpayers sought refunds, and the trial court entered judgment for the Board.

The court of appeal affirmed. The court held that the exclusion from the definition of “sale” for leases of mobile transportation equipment did not apply to these transactions. Taxpayers did not lease the equipment from the transferors, but rather acquired all the indicia of ownership of the equipment. The court also held that the consideration paid for the equipment was the taxpayers’ assumption of the liabilities owed by the transferors, and tax was properly measured by those amounts. *Newco Leasing, Inc., et al. v. State Board of Equalization* (1983) 143 Cal.App.3d 120.

Taxpayer Sold Tooling to Purchaser Even Though Legal Title was Retained as Security

Northrop entered into a contract with an airplane manufacturer to manufacture certain fuselage and wing fairing parts for model 747 airplanes. The contract required Northrop to use certain specially designed tooling it either fabricated or purchased. The Board assessed tax on Northrop’s sale of the tooling, and Northrop brought an action to recover the tax. The court of appeal held that there was a sale by Northrop of the tooling, notwithstanding the fact that the contract provided for retention of legal title to the tooling by the seller as security for the purchase price of the parts sold.

The provisions of the sale agreement gave the buyer almost absolute control over the use and disposition of the tooling, including an irrevocable power of attorney from the seller to execute in its name any documents appropriate to transfer of the tooling. *Northrop Corporation v. State Board of Equalization* (1980) 110 Cal.App.3d 132.

O

Incidence of the Sales Tax is on the Retailer

Taxpayers were insurance companies who paid sales tax reimbursement on retail purchases of personal property for the years 1973 through 1976. During that time, California Constitution, Article XIII, SS14-4/5 (now Cal. Const. Art. XIII, Sec. 28, subd. (f)) and Revenue and Taxation Code Section 12204 restricted taxation of insurance companies to the imposition of the gross premium tax. Taxpayers brought a refund action and the trial court entered a judgment of dismissal.

The court of appeal affirmed, holding that the legal incidence of the retail sales tax is on the retailer and not the consumer, even though most often the real economic burden of the tax eventually falls on the consumer. Thus, the court concluded that neither the Constitution nor the statute forced the imposition of a sales tax on retail sales of personal property to insurance companies. *Occidental Life Insurance Company v. State Board of Equalization* (1982) 135 Cal.App.3d 845.

Application of Regulation 1521 to Manufacturer and Installer of Elevator Systems is Not Unreasonable

Plaintiff claimed that the application of sales tax to certain elevator components manufactured and installed by it classified as fixtures by the Board in accordance with Regulation 1521 was arbitrary and capricious and had no reasonable or rational basis. Regulation 1521 distinguishes, for purposes of applying sales and use tax, between fixtures and materials used in construction contracts. The trial court agreed with plaintiff. The court of appeal reversed, finding that there was no substantial evidence to show that the Board's ruling was unreasonable, and finding that the trial court had been mistaken in substituting its own policy judgment for that of the Board. *Oliver and Williams Elevator Corp. v. State Board of Equalization* (1975) 48 Cal.App.3d 890.

Sale of Hospital Equipment is a Nontaxable Occasional Sale

Taxpayers, two hospitals, each sold in a single sale all of the assets of the hospitals, including equipment used in providing tax-exempt medical and nursing services, and other equipment used in selling meals, supplies, and pharmaceuticals, for which selling activities each hospital held a seller's permit. The Board asserted sales tax on the sale of all the equipment. The trial court ordered the Board to refund taxes paid on the sale of the equipment used in providing medical and nursing services.

The California Supreme Court affirmed, and held that no sales tax was due on the sales of the medical and nursing equipment. That equipment was sold in a nontaxable occasional sale under Revenue and Taxation Code section 6006.5(a) since each hospital was not required to hold a seller's permit in rendering its medical and nursing services. The court held that Board Regulation 1595(a)(3), which classified each hospital as a unitary business since it was required to hold a seller's permit for some of its activities, was void as in conflict with section 6006.5(a). The regulation imposed a condition on the occasional sale exemption not supported by the statute, namely that if a unitary business held a seller's permit for some of its activities, it could not make an exempt occasional sale of assets used solely in other activities not requiring a seller's permit. *Ontario Community Foundation, Inc., et al. v. State Board of Equalization* (1984) 35 Cal.3d 811.

United States Government Contractors Subject to Use Tax on Fixtures

Taxpayer, an electrical contractor, entered into a subcontract to furnish and install an emergency standby uninterruptible power system at a U.S. Air Force base. Under Revenue and Taxation Code Sections 6384 and 6007.5, property purchased by a contractor and used in the performance of a contract with the United States for the construction of an improvement to real property is subject to sales or use tax. Section 6381 exempts from such tax the gross receipts from the sale of tangible personal property to the United States Government. Taxpayer contended that the equipment it purchased for

the uninterruptible power system it supplied to the United States Government should be classified as machinery or equipment (considered tangible personal property), for which no tax need be paid, rather than as a fixture (considered an improvement to real property) subject to sales or use tax. The court of appeal held in favor of the Board. The system was intended to provide accessory power to the facility in order to maintain full security lighting in case of a power failure, and the court found that a system so crucial to the facility's operations did not fall within the definition of machinery or equipment, but rather was a fixture. In addition, the court found that the system was an essential, integral part of the operation of the facility, and thus must be classified as a taxable fixture. Finally, the court found that taxpayer purchased the system from out-of-state retailers for use in California, and was thus subject to the use tax. *Overhead Electric Co. v. State Board of Equalization* (1991) 227 Cal.App.3d 1230.

No Refund of Voluntary Payment of Estimated Tax Liability

Taxpayer sought a refund of amounts voluntarily paid to the Board of Equalization in advance payment of estimated tax liability. Taxpayer made the payments during an extension of time within which a notice of deficiency determination might be mailed. The extension period expired, however, before the Board actually issued a deficiency notice. Taxpayer contended that the Board could not retain the amounts paid because the deficiency notice was not issued within the statutory period of limitations.

The Court of Appeal, in holding that taxpayer was not entitled to a refund, noted that the record showed that at the time the payment was made, taxpayer's tax delinquency was in excess of the sum paid. The court observed that taxpayer's liability to pay the deficiency was a continuing liability and was not created by the issuance of the deficiency notice and that in issuing a deficiency determination the Board had merely determined that, after the payment in question, there still remained a balance due which taxpayer had failed to pay. The court pointed out that the Board had recognized the bar of the statute of limitations as to any amounts due over and above the amount paid. *Owens-Corning Fiberglas Corp. v. State Board of Equalization* (1974) 39 Cal.App.3d 532.

P

Surety Liable for Penalties and Interest on Transactions Occurring Prior to Cancellation of Bond

The State of California sought to enforce respondent's liability on a surety bond for penalties and interest assessed against respondent's principal subsequent to the effective date of the cancellation of the bond. The penalties and interest were assessed for transactions all of which had occurred prior to the cancellation date. The contract of surety provided that the surety could terminate its liability to the extent and in the manner set forth in Civil Code

Section 2851, but that in no event would the surety be relieved from liability with respect to transactions occurring before the effective date of cancellation of the bond. The surety contended that it was not liable for penalties and interest assessed subsequent to the cancellation of the bond since Civil Code Section 2851 provides that after the effective date of cancellation, “. . . the surety is relieved of all liability which otherwise thereafter would arise on its bond.”

The court, observing that Section 2851 does not stand alone but must be applied to the contract of surety, held that respondent had waived the provisions of Civil Code Section 2851 and had agreed to be liable for the sums at issue. Since no public policy dictated that the agreement not be enforced, its terms were binding upon respondent. *People v. Pacific Employers Ins. Co.* (1973) 36 Cal.App.3d 296.

Six-Month Principal Use Test Invalid Where More Information is Available

The Board had utilized a six-month principal use test for the first six months of ownership of an aircraft to establish whether tax applied to the sale of an aircraft which was used for common carrier purposes and for pilot-training purposes. Because plaintiff's use of the aircraft for common carrier purposes was less than 50 percent of the total use of the aircraft during the first six months of ownership of the aircraft by plaintiff, the Board denied plaintiff the exemption set forth in Section 6366 of the Revenue and Taxation Code.

That section exempts from sales and use tax aircraft sold to persons using such aircraft as common carriers. The court held that the exemption applied because the test had not been promulgated as a formal regulation, which would have assured constructive notice to plaintiff, and because plaintiff had no actual notice of the test. The court further held that the six month test was not justified by administrative necessity where plaintiff's records were available to establish that the aircraft was used for common carrier purposes for over 50 percent of the total use of the aircraft during the time that it was owned by plaintiff. *Pacific Southwest Airlines v. State Board of Equalization* (1977) 73 Cal.App.3d 32.

Board's Use of Audit Test Upheld

Taxpayer, an operator of a retail grain and feed store, sold hay, grain, pet food, and related products. An exemption certificate pursuant to Revenue and Taxation Code Section 6358 was obtained and kept on file from each customer who purported to purchase tax-exempt feed. Following an audit during which taxpayer claimed 80 percent of its sales consisted of exempt feed, the Board conducted a field test and determined that approximately 53 percent of sales were to customers who claimed exemption.

The court of appeal affirmed the trial court's admission of the test amounts. The court held that although taxpayer kept an exemption certificate on file from each customer who purported to purchase tax exempt feed, taxpayer failed to meet the burden of proving that 80 percent of the sales were exempt because there were no records correlating sales invoices to the exemption certificates. The court also held that the trial court properly admitted the results of the Board's test, where substantial evidence supported the trial court's findings that sales during the test period were representative of those during the audit period, and that the condition and conduct of taxpayer's business remained substantially similar during both periods. *Paine v. State Board of Equalization* (1982) 137 Cal.App.3d 438.

Promotional Displays Subject to Use Tax when Not Resold with Merchandise

Taxpayers, Max Factor & Co. and Parfums-Corday, Inc., purchased promotional displays under resale certificates, stored them in California, and assembled them into promotional prepacks together with merchandise. Taxpayers shipped the prepacks to retailers within and outside of California, who resold the merchandise but not the displays. Taxpayers did not make a separate charge for the displays or increase the price of the merchandise to cover the cost of the displays.

Taxpayers paid use tax on the displays shipped to California retailers, but the Board also assessed use tax on the displays shipped out of state. Taxpayers contended: (1) they had resold the displays because their customers purchased the displays as an integral part of the prepacks, and (2) if they did not resell the displays, they did not use them in California because they shipped the displays as gifts out of state for use thereafter solely outside the state.

The court of appeal held in favor of the Board. The court held that the Board's Regulation 1670(c) was objective and reasonable in establishing that a sale of a marketing aid occurs only when a taxpayer recoups at least 50 percent of its cost either by separate billing for the marketing aid or by increasing the price of the merchandise. Since the taxpayers did neither, they were properly deemed the consumers of the displays. Also, taxpayers had a functional purpose for the displays in California by warehousing them and assembling them into the prepacks, and thus were liable for use tax regardless of the ultimate destination of the displays. *Parfums-Corday, Inc. v. State Board of Equalization* (1986) 187 Cal.App.3d 630.

A Taxpayer Who Fails to File for a Timely Refund May Not Instead Deduct the Refund Amount on Current Tax Return

Taxpayer was a subcontractor who sold tangible personal property to a construction contractor. Taxpayer collected and paid sales tax. The contractor later determined that the tangible personal property was "machinery and equipment" and therefore eligible for a resale certificate under Regulation

1521. The contractor provided taxpayer with a resale certificate, and taxpayer refunded the sales tax to the contractor. On the next sales and use tax return, taxpayer claimed a credit for the refunded sales tax, instead of filing a claim for refund. When taxpayer was audited five years later, the credit was disallowed. Taxpayer then filed suit for refund. The court of appeal held that it had no jurisdiction to grant relief because taxpayer had failed to exhaust its administrative remedies by filing a claim for refund with the Board. An improper tax-paid purchases resold credit cannot be used to avoid the requirement of a timely claim for refund. *Philips and Ober Electric Co. v. State Board of Equalization* (1991) 231 Cal.App.3d 723.

Delivery of Motor Homes in State to Out-of-State Purchasers is Taxable

Taxpayer sold motor homes to out-of-state purchasers, and the contracts required shipment out of state. Taxpayer delivered the motor homes to a forwarding agent who in turn secured a one-way trip permit and delivered the motor homes in California to the purchasers (or in some cases, unnamed drivers), who drove them out of state. Taxpayer contended the deliveries satisfied the requirements for exemption from sales tax for interstate shipments.

The court of appeal held in favor of the Board. The court held that Revenue and Taxation Code Section 6396 exempts from sales tax sales in interstate commerce only when the seller or forwarding agent actually delivers the property sold to the purchaser out of state. Sales and Use Tax Regulation 1620, which requires actual out-of-state delivery, was a reasonable interpretation of Section 6396. The burden of proof to establish the exemption is on the seller, and that burden was not met for transactions where the driver was not named. *Pope v. State Board of Equalization* (1988) 202 Cal.App.3d 73.

Technology Transfer Agreements

Taxpayer entered into written agreements to provide artwork on a temporary basis for use as book illustrations and rubber stamp designs. The customers copied or reproduced images from the finished artwork and returned the tangible artwork to taxpayer. Taxpayer retained all other rights in the artwork not specifically transferred under the agreements, including title. Taxpayer argued that she did not sell her artwork because the use rights she transferred were intangible property. The court held that taxpayer did, in fact, make taxable leases by transferring the artwork in tangible form for consideration. However, the court also concluded that the agreements were technology transfer agreements under Revenue and Taxation Code sections 6011(c)(10) and 6012(c)(10), and that these provisions applied on a retroactive basis to exclude from tax the charges attributable to the transfers of copyright interests. Accordingly, since taxpayer did not separately state a price for the tangible personal property, tax applied to these leases based on the price at which that tangible personal property had been sold, leased, or

offered to third parties or based on 200 percent of the cost of materials and labor used to produce the tangible personal property. *Preston v. State Board of Equalization* (2001) 25 Cal.4th 197.

Antiseptic Sudsing Skin Scrub Used by Hospital is an Exempt Medicine

Taxpayer manufactures Betadine Surgical Scrub, an antiseptic, microbicidal, sudsing skin cleanser, which it distributes and sells to hospitals for preoperative use on patients, preoperative scrubbing by doctors, nurses and other operating personnel, and for hand cleansing by hospital personnel caring for and treating patients. The Board determined that Betadine was not an exempt medicine, except when applied to patients.

The court of appeal held in favor of taxpayer, finding that Betadine is an exempt medicine. Betadine is a “medicine,” since it is a substance or preparation intended for use by external application to the human body in the mitigation and prevention of disease, and is commonly recognized as a substance or preparation intended for that use. A medicine is exempt from taxation if, among other things, it is sold to a “health facility for the treatment of a human being.” The court found that, in all its hospital uses, Betadine is applied to the human body. In addition, the application of Betadine by hospital personnel to their own bodies benefits the patient and constitutes a critical component of the patient’s treatment. The court noted that the Legislature had expanded the scope of exempt medicines beyond prescription medicines. *Purdue Frederick Co. v. State Board of Equalization* (1990) 218 Cal.App.3d 1021.

Q

R

Federal Tax Injunction Act Bars Action to Enjoin Collection of State Taxes

Plaintiff leased motor vehicles to the U.S. Government, and the Board imposed sales and use taxes on the leases. Plaintiff filed an action in federal court to enjoin the collection of the state taxes. The U.S. District Court dismissed the action.

The Ninth Circuit U.S. Court of Appeals affirmed, holding that the federal Tax Injunction Act, 28 U.S.C. Section 1341, bars the federal courts from enjoining the collection of state taxes where the taxpayer has a plain, speedy, and efficient remedy in state courts. The taxpayer in the instant case had such a remedy because it could have paid the taxes and sought a refund in state court. Thus, the Tax Injunction Act bars this action despite plaintiff’s claim that it did not have sufficient assets to pay the taxes.

The court also held that the federal district court did not have ancillary jurisdiction over this action as a result of *United States v. California State Board of Equalization* (1981) 650 F.2d 1127 (Ninth Circuit), aff’d 456 U.S.

901 (1982), in which the court held that taxes on certain leases to the United States were unconstitutional. The United States was not a party to this action, and there was not an identity of interest between taxpayer and the United States to allow taxpayer to assert the federal interest in federal court. *Redding Ford v. State Board of Equalization* (1983) 722 F.2d 496 (9th Cir. 1983), cert den. (1984) 469 U.S. 817.

Classification of Shopping Guide as Taxable Publication was Constitutional

Appellants were the printers and publisher of a shopping guide distributed without charge in Humboldt County. More than 90 percent of the shopping guide consisted of advertising. Sales and Use Tax Regulation 1590 provides that a nontaxable periodical does not include shopping guides or other publications of which 90 percent or more consists of advertising. Appellants contended that the Regulation 1590 classification of advertising publications as taxable was an infringement on freedom of speech, was a denial of equal protection, and was unauthorized by the Legislature.

The court of appeal held in favor of the Board. The court held that commercial speech was not entitled to the same degree of First Amendment protection as noncommercial speech, and that differential tax treatment of advertising publications was not content-based discrimination prohibited by the First Amendment.

The court also held that Regulation 1590 did not deny equal protection to the appellants. The regulation did not restrict or regulate in any manner their right to engage in commercial speech, but rather merely withheld from them a tax subsidy. Since the Legislature sought to subsidize and encourage publications which disseminate valuable and timely news and information, the Board could rationally conclude that publications which are mere conduits for advertising do not fit within the objective sought to be achieved by the tax exemption for newspapers and periodicals.

The court also held that Regulation 1590 did not exceed the Board's authority to adopt regulations to implement the Sales and Use Tax Law. It did not arbitrarily classify newspapers and periodicals, but instead only gave substantial meaning to the terms as they are used in Revenue and Taxation Code Section 6362. This interpretation was necessary in order to differentiate those publications from other printed matter subject to tax. The presence of advertising as a basis for the distinction was a reasonable classification method, and is also used by the U.S. Postal Service for the second class mailing privileges of periodicals. *Redwood Empire Publishing Co. v. State Board of Equalization* (1989) 207 Cal.App.3d 1334.

Standard of Proof of Tax Fraud is Clear and Convincing Evidence

A bankruptcy court upheld the Board's claim for civil tax fraud against a debtor, based on a preponderance of the evidence. The bankruptcy court held that the California Supreme Court decision in *Liodas v. Sahadi* (1977) 19 Cal.3d 278, established that standard of proof in civil fraud cases. A U.S. district court affirmed the bankruptcy court.

On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed the bankruptcy court. The court predicted that the California standard of proof for civil tax fraud would be clear and convincing evidence. The court based its decision on *Marchica v. State Board of Equalization* (1951) 107 Cal.App.2d 501, and Board administrative decisions in franchise and income tax appeals. Although *Marchica* was an earlier decision by a court of appeal, and *Liodas* was a later decision by the California Supreme Court, the *Liodas* decision did not overrule or mention *Marchica*, and dealt with civil fraud generally, not civil tax fraud specifically. *In re Renovizor's, Inc.* (9th Cir. 2002) 282 F.3d 1233.

Signs were Fixtures

Taxpayer furnished and installed signs pursuant to construction contracts. He contested the Board's conclusion that the signs were fixtures under Regulation 1521. The court held that the Board had properly applied Regulation 1521 in determining that the signs at issue were fixtures. *Richard Boyd Industries, Inc. v. State Board of Equalization* (2001) 89 Cal.App.4th 706.

The Imposition of a Sales Tax by the San Diego County Regional Justice Facility Financing Agency After Approval of the Tax by a Simple Majority of the Voters Violated Proposition 13

In 1987 the Legislature passed an act creating the San Diego County Regional Justice Facility Financing Agency. The Agency was charged with adopting a tax ordinance imposing a supplemental sales tax of one-half of 1 percent throughout San Diego County for the purpose of financing the construction of justice facilities. At an election held in June 1988, the County's voters approved the tax ordinance by 50.8 percent. The plaintiffs challenged the validity of the tax, asserting that it violated the supermajority requirements of Proposition 13 for special taxes imposed by special districts.

The Supreme Court held that a "special district" includes any local taxing agency created to raise funds for city or county purposes to replace revenues lost by reason of Proposition 13. Since the Agency was created to raise funds for county purposes and thereby circumvent Proposition 13, it was a special district.

The court further held that the sales tax was a "special tax" which it defined as a tax levied to fund a specific governmental project or program, such as the construction and financing of the County's justice facilities.

Since the Agency was a special district and the sales tax it imposed was a special tax, the imposition of the tax violated Proposition 13 which requires approval of the tax by at least two-thirds of the voters. *Rider v. County of San Diego* (1991) 1 Cal.4th 1.

Board has Authority to Assert Tax Based on Information Other than Books and Records of Taxpayer, and Taxpayer then has Burden of Proof to Show that Board's Audit is Incorrect

Plaintiff was engaged in business as a tavern keeper and timely filed sales and use tax returns with the Board. The Board conducted an audit of plaintiff on the basis that of the liquor purchased by plaintiff, certain amounts were used in drinks that were sold and certain amounts were wasted or consumed without being sold. The Board thus computed taxable sales in excess of those shown in plaintiff's books and records. Plaintiff paid the tax asserted and sued for refund on the basis that it maintained all the books and records required by law and that they were in agreement with each other.

The court of appeal held that the Board was not required to accept as conclusive evidence the taxpayer's books and records, even though these were in agreement with each other, where the Board, using recognized and standard accounting procedures, established in an audit that the books and records did not disclose the correct amount of tax liability. The court further held that where the Board has established a deficiency, the burden of proof is upon the taxpayer to explain the disparity between the taxpayer's books and records and the results of the Board's audit. *Riley B's, Inc. v. State Board of Equalization* (1976) 61 Cal.App.3d 610.

S

A Class Action Can be Brought Against the Board for Refund of Sales Taxes Based on a Class Refund Claim

Plaintiffs brought a class action against the Board for refund of sales taxes paid by them and others similarly situated. The Board demurred on the ground that the complaint contained no allegation that the unnamed plaintiffs had filed claims as required by law. The trial court sustained the demurrer, but the court of appeal reversed with directions to the trial court to overrule the demurrer.

The Revenue and Taxation Code makes the filing of a claim for refund with the Board mandatory. However, the court held that "claimant" must be equated with the class itself and rejected the contention that individual claims must be filed for each member of the class where the claim by the plaintiffs was filed for themselves and for all others similarly situated. The court also rejected the Board's argument that it is impossible to act on a claim for refund where there are unnamed claimants and no specific amount is claimed, stating that the Board could determine the identity of each unnamed plaintiff and the amount of his tax payments from the Board's own records.

The court found that there is an ascertainable class with a well defined community of interest in the questions of law and fact affecting the parties; and that a class action is therefore proper. *Santa Barbara Optical Co., Inc. v. State Board of Equalization* (1975) 47 Cal.App.3d 244 [disapproved to the extent inconsistent with *Woosley v. State of California* (1992) 3 Cal.4th 758].

Sale of Assets is Taxable when Seller is Required to Hold Seller's Permit

A corporation engaged in the exploration, development, and production of crude oil sold its assets. Prior to the sale of its assets, the corporation had neither sold tangible personal property at retail nor consumed any of the crude oil it produced. Rather, all the crude oil it produced was sold for the purpose of refining or processing into gasoline, fuel oil, or other petroleum products.

The Board imposed sales tax on the corporation's sale of its assets. The purchaser of the assets paid the tax and filed suit for refund. The trial court granted judgment in favor of the Board.

The court of appeal affirmed. It held that the sale of the assets was subject to sales tax because the sale was a retail sale, and the corporation was a "seller" under Revenue and Taxation Code section 6014 since the crude oil it sold was suitable for retail sale. It was irrelevant that the crude oil was not sold at retail but was instead sold for processing into other petroleum products. Since the sale of the assets was by a seller required to hold a seller's permit, the sale was not an exempt occasional sale. *Santa Fe Energy Co. v. State Board of Equalization* (1984) 160 Cal.App.3d 176.

Sales of Goods to Common Carrier Not Exempt Unless a Proper Bill of Lading is Issued

Taxpayer sold goods to an airline common carrier under bills of lading which listed the carrier, not the taxpayer, as the shipper. The goods were delivered to and inspected by the carrier in California, but were for use out of state.

The Board denied an exemption under Revenue and Taxation Code Section 6385 because the bill of lading did not show taxpayer as the shipper as required in Regulation 1621. The taxpayer filed an action for refund, and the trial court entered judgment for the taxpayer.

The court of appeal reversed and held in favor of the Board. The court held that the place of delivery determines whether sales to common carriers are exempt under Section 6385. Taxpayer's sales were not exempt because the bills of lading did not show taxpayer as the consignor, the contract documents indicated delivery occurred in California, and the carrier's inspection of the goods at the place of delivery was the kind of inspection performed by a purchaser, not a common carrier. *Satco, Inc. v. State Board of Equalization* (1983) 144 Cal.App.3d 12.

Taxpayer Cannot be Compelled to Disclose Information Concerning Specific Entries on His Sales Tax Return

Taxpayer was a defendant in a class action suit in which it was alleged that taxpayer had collected excess sales taxes from retail customers. Plaintiff submitted an interrogatory to taxpayer seeking disclosure of information concerning specific entries in taxpayer's sales tax return. Taxpayer objected to this interrogatory and refused to answer. The Superior Court granted plaintiff's motion for an order compelling taxpayer to answer the interrogatory. Taxpayer then sought a writ of prohibition.

The Supreme Court, in issuing the writ, held that Section 7056 of the Revenue and Taxation Code, which makes it unlawful for the Board to disclose any information that a retailer is required to furnish to the Board, including any return, manifests a clear legislative intent that disclosures made in tax returns shall not be indiscriminately exposed to public scrutiny. The court noted that the purpose of provisions such as Section 7056 is to facilitate tax enforcement by encouraging a taxpayer to make full and truthful declarations in his return without fear that his statements will be revealed or used against him for other purposes, and held that the returns are privileged. To require a taxpayer to furnish information concerning specific entries in the return would render the privilege meaningless. *Sav-On Drugs, Inc. v. Superior Court* (1975) 15 Cal.3d 1.

Buyers of Business Liable as Successors Even Though They Complied With Bulk Sales Law

The buyers of a grocery business in a bulk sale sued the Board for a tax refund after the Board determined that the buyers were personally liable, pursuant to the successor liability statutes (Rev. & Tax. Code, §§ 6811 and 6812), as successors for the sales and use taxes owed by the sellers of the business. The trial court granted summary judgment in favor of the Board.

The Court of Appeal affirmed. The court held that the buyers did not comply with the withholding requirement of section 6811, and thus were personally liable under section 6812, for the sales and use taxes owed by the sellers of the business. The buyers deposited the purchase funds with an escrow agent and then filed an interpleader action with the purchase funds, in order to allow the business's creditors, including the Board, to resolve the amounts owed. However, the buyers failed to withhold the purchase funds as required by section 6811. The court also held that the buyers could not avoid personal liability for their failure to comply with the withholding requirement, notwithstanding that the buyers filed the interpleader action with the purchase funds in order to allow the business's multiple creditors to resolve the amounts owed. The provisions of the bulk sales law (Cal. U. Com. Code, § 6101 et seq.) do not take priority over the successor liability statutes. The court further held that the Board was not collaterally estopped from imposing successor liability on the buyers of a grocery business in a

bulk sale, notwithstanding that the Board's stipulation in federal court disclaimed any interest it might have had in the interpleaded funds. *Schnyder et al. v. State Board of Equalization* (2002) 101 Cal.App.4th 538.

Out-of-State Retailer's Use of Teachers and Librarians to Solicit Book Sales Constitutes Sufficient Nexus with California for California to Impose the Use Tax Collection Duty on the Retailer

Plaintiff was an out-of-state retailer of books and other items. Plaintiff had no employees or places of business in California, but it distributed catalogs by mail to teachers and librarians at California schools. The teachers who elected to do so distributed offer sheets to their students, consolidated the students' orders, collected payments, and submitted a single order and full payment to plaintiff in the teacher's name. Plaintiff shipped the items ordered from its Missouri warehouse to each teacher placing the order, and each teacher distributed the items to the students who ordered them. The taxpayer rewarded the teachers with bonus points for merchandise.

Taxpayer contended that it was not a retailer engaged in business in California under Revenue and Taxation Code Section 6203 because the teachers had no initial obligation to act to solicit orders, and had no written agency agreement with the taxpayer. Since the teachers had no obligation to act, plaintiff argued, the teachers were not acting under plaintiff's authority in soliciting orders.

The court of appeal decided in favor of the Board, holding that the teachers were not acting under anyone else's authority except that of plaintiff, and that once the teachers undertook to solicit orders, they were acting under plaintiff's authority as its agents. By accepting the orders and shipping the items, the taxpayer ratified the acts of the teachers and confirmed their authority as its agents. Plaintiff depended upon the teachers to act as its conduit to the students. The court held that plaintiff's use of teachers and school librarians to solicit sales from students constituted sufficient nexus to require the taxpayer to collect the use tax due on the students' purchases. *Scholastic Book Clubs, Inc. v. State Board of Equalization* (1989) 207 Cal.App.3d 734.

Liquidation Sales by Trustee in Bankruptcy are Subject to Tax

Respondent purchased skis from a bankruptcy trustee for use as rentals. The U.S. Court of Appeals, Ninth Circuit, held that the bankruptcy court's injunction against the Board's assessment of sales tax or use tax on a trustee's liquidation sale of the skis also barred the purchaser's collection of use tax from its lessees. The Court of Appeals relied on two previous Ninth Circuit cases, *Cal. St. Bd. of Equalization v. Goggin* (1951) 191 F.2d 726, and *Cal. St. Bd. of Equalization v. Goggin* (1957) 245 F.2d 44. In the *Goggin* cases, the Board assessed sales and use taxes on bankruptcy liquidation sales. The Ninth Circuit Court of Appeals held that the taxes were unlawful because they burdened the federal functions of the bankruptcy court, and violated the principle of intergovernmental tax immunity. However, other federal circuit courts had reached the contrary result in similar cases.

The U.S. Supreme Court held in favor of the Board. The court held that a nondiscriminatory tax on a bankruptcy liquidation sale was not barred by the now-discredited intergovernmental tax immunity doctrine, and that there was no longer any constitutional impediment to the imposition of a sales tax or a use tax on a bankruptcy liquidation sale. The tax does not discriminate against bankruptcy trustees or those with whom they deal. Nor is the bankruptcy trustee so closely connected to the federal government that the two cannot realistically be viewed as separate entities. The court also held that there was no federal statute expressly preempting the power of the states to tax in this area. *California State Board of Equalization v. Sierra Summit, Inc.* (1989) 490 US 844, 104 L.Ed.2d 910.

Transfer of Master Film Negatives was a Sale of Tangible Personal Property

Plaintiff filed an action for a refund of sales tax paid on the transfer of film negatives and master recordings used to make audio visual materials for training medical personnel. The transfer was part of a sale by plaintiff of the segment of its business devoted to producing and marketing such materials. The transfer consisted of an exchange of the assets and name of its wholly owned subsidiary for common stock of the transferee's parent. The subsidiary dissolved after the exchange, and plaintiff assumed its liability.

Plaintiff contended that the transfer of certain master film negatives to be used for reproduction purposes involved the sale of intangible property; that the transfer was a sale for resale, since the masters were to be used to make copies for resale; and that the transfer was exempt as a merger. The trial court entered judgment in favor of the Board. The Supreme Court affirmed, holding that the sale was a sale of tangible personal property; that the tax on the transfer was measurable by what plaintiff received for the property as a whole, without deduction for amounts paid for intellectual or other intangible components; that the sale was not a sale for resale, since the primary purpose of selling the film negatives and master recordings was to use them in

manufacturing the final product rather than to incorporate them into that product; and that the transfer did not meet the requirements of a tax-free merger. *Simplicity Pattern Company v. State Board of Equalization* (1980) 27 Cal.3d 900.

Automatic Stay in Bankruptcy Violated by Board's Cashing of Certificate of Deposit Taken as Security from Taxpayer

The Board required that, as a condition of taxpayer's doing business, taxpayer provide security for payment of the sales and use taxes. Taxpayer complied by providing a certificate of deposit payable to the Board. Taxpayer subsequently filed a petition for reorganization pursuant to Chapter 11 of the Bankruptcy Law and ceased doing business, at which time taxpayer owed the Board sales and use tax in excess of the amount of the certificate. The Board presented the certificate for payment, and the Chapter 11 proceeding was converted to a Chapter 7 proceeding. The Ninth Circuit Court of Appeals rejected the Board's argument that the certificate of deposit became the property of the Board held in trust and was thus immune from the claims of general creditors. Property seized by a creditor prior to the filing of a petition for reorganization pursuant to Chapter 11 belongs to the bankruptcy estate, and the court therefore found that the Board violated the automatic stay in bankruptcy by cashing taxpayer's certificate of deposit. *In re Sluggo's Chicago Style, Inc.* (9th Cir. 1990) 912 F.2d 1073.

Taxpayer Entitled to Maintain Refund Action While Making Partial Payments of Use Tax Liability

A California corporation incurred a use tax liability for certain personal property purchased outside the state. Appellant corporation made two partial payments of \$250 each on the tax owed, and entered into an installment agreement to pay under protest the total tax liability in monthly installments of \$1,000. A claim for refund was filed for the \$500 actually paid and was not acted upon by the Board within six months. Appellant then filed suit while the installment agreement was in effect. The court held that when a taxing authority voluntarily agrees to accept payment on an installment basis, and in the absence of any statutory provision to the contrary, a taxpayer may maintain a refund action which, in effect, determines the validity of the entire tax in question. *Snoozie Shavings, Inc. v. State Board of Equalization* (1979) 97 Cal.App.3d 771 (disapproved in *State Board of Equalization v. Superior Court (O'Hara & Kendall Aviation, Inc.)* (1985) 39 Cal.3d 633).

Payments in Settlement of Litigation

Plaintiff utilities sought refunds of sales tax reimbursement and use taxes paid with respect to purchases of electrical equipment made between 1956 and 1959. By late 1965, plaintiffs had entered into settlement agreements with the manufacturers of the equipment under which the manufacturers were to pay so-called "voluntary price adjustments" to the plaintiffs in

exchange for the plaintiffs' dismissing pending treble damage actions against the manufacturers based upon the manufacturers' price-fixing activities. The plaintiffs then claimed that their taxes were subject to re-computation based on the "adjusted" price of their purchases.

The California Supreme Court, in reversing the decision of the trial court allowing the refund, held that so-called "voluntary price adjustments" arrived at in settlement of antitrust litigation do not entitle a taxpayer to a tax refund measured by the "inflated" portion of the sales price. The court observed that the payments in the instant case, although termed "voluntary price adjustments," were in no way distinguishable from other payments, by way of settlement or judgment, which might be received by a purchaser of goods from the seller as a result of litigation arising out of the sales transaction. The court also stated that the allowance of a tax refund under the circumstances of this case would, in general, produce the undesirable and inequitable effect of shifting one cost of a price-fixing conspiracy from the perpetrators of the conspiracy to the taxpayers of the state, since federal antitrust law contemplated that violators of the law are to be held liable for all damages resulting from any illegal activity, including foreseeable excess tax costs to victims of the conspiracy. *Southern California Edison Co. v. State Board of Equalization* (1972) 7 Cal.3d 652.

Tax Applies to Sale to Common Carrier Acting in Dual Capacity as Purchaser and Carrier

Taxpayer had been assessed tax upon the sale of freight car wheels shipped to out-of-state points via the purchasing common carrier railroad. Shipment was made in technical compliance with Section 6385 of the Revenue and Taxation Code, which provides an exemption for certain sales of tangible personal property to common carriers, if the property is shipped by the seller via the purchasing carrier to out-of-state destinations. Prior to completing delivery of the wheels out-of-state, the railroad unloaded them at its shops in California and pressed them onto axles owned by it. The wheel-axle units were then shipped out of state.

The court, in holding that the tax had been properly assessed, stated that in order for the exemption in Section 6385 to apply, the role of the common carrier inside the state must be limited solely to its capacity as a common carrier transporting the purchased property, and that the purchaser-carrier had exercised sufficient dominion over the property in California so as to transform its capacity from that of common carrier to that of buyer. *Southern Pacific Equipment Co. v. State Board of Equalization* (1971) 16 Cal.App.3d 302.

Method of Establishing Value of Trading Stamps Approved

Regulation 1671 defines the selling price, for sales tax purposes, of goods exchanged for trading stamps as being the average amount paid to the trading stamp operator by its customers for the stamps surrendered in exchange for

the goods. That regulation further provides that the amount the operator pays as tax must not be less than the amount of tax reimbursement it collects from its customers. The defendant trading stamp operator in this case, Sperry & Hutchinson Co. (S & H), had collected sales tax reimbursement and paid sales tax on the basis of \$3.00 per book of 1200 stamps. S & H catalogs and stamp books stated that sales tax on redemption would be based on \$3.00 per book. The \$3.00 figure approximated the average amount paid to defendant for the stamps, without taking into account certain cash rebates and extra stamps given to customers.

Plaintiffs brought a class action claiming that defendant had overcollected sales tax reimbursement by failing to include the cash rebates and extra stamps in calculating the average price. Defendant cross-complained against the Board for indemnification in the event plaintiffs prevailed. The court of appeal upheld the trial court in finding that the method of calculation used was justified since the rebates or free stamps were given only in exchange for services rendered such as promotional advertising, guaranteed large distributions, and other services, and were not reductions in the selling price of the stamps. *Botney v. Sperry & Hutchinson Co.* (1976) 55 Cal.App.3d 49.

The Board Can Properly Reduce Amounts Awarded under a Claim for Refund by Deficiencies Owed for the Period Covered by the Claim

The Court of Appeal held that the Board properly reduced amounts awarded under timely filed claims for refund by deficiencies that occurred during the periods covered by the claim for refund, even though the deficiencies were offset after the expiration of both the statute of limitations and agreements extending the time for assessing such deficiencies. The court reasoned that under the doctrine of “equitable setoff,” a claim for refund “throws open the taxpayer’s entire tax liability for the period in question.” Applying this doctrine, the court held that even though the Board was barred by the statute of limitations from issuing a deficiency assessment attributable to one reporting period, it was proper for the Board to apply that underpayment against an overpayment in a different reporting period, provided both periods are covered by the claim for refund. However, the court ruled that this doctrine could not be used to allow a claim for refund to set off a deficiency assessment attributable to a period barred by the statute of limitations if the barred period was not included in the claim for refund. *Sprint Communications Company v. State Board of Equalization* (1995) 40 Cal.App.4th 1254.

State has Priority Claim to Assets in Hands of Receiver

The State Board of Equalization intervened in an action brought by a creditor on a promissory note against a delinquent taxpayer. A receiver had been appointed by the court and had come into possession of the proceeds of the principal receivership asset, a dealer’s reserve account, following the rendering of judgment for the creditor. The Board sought to assert its priority

under Section 6756 of the Revenue and Taxation Code, which grants to the State a priority for unpaid taxes against general creditors of a debtor when the debtor is insolvent, and under Section 6757 of the code, under which the Board may obtain, upon the filing of a certificate of delinquency, a lien for unpaid taxes having the force, effect, and priority of a judgment lien. The Board had filed a certificate of delinquency prior to the time that the creditor secured judgment. The creditor contended that the receiver was the owner of the debtor's assets and that, therefore, the Board acquired no priority.

The court of appeal, in holding that the Board was entitled to priority under both statutory provisions, stated that a receiver takes the property in the condition existing at the time of his appointment, impressed with the legal and equitable rights and claims of creditors. The creditor never had a lien on the funds paid to the receiver, no levy having been made on the specific property, and thus had no right greater than that of a general creditor. Likewise, when the Board recorded its certificate of delinquency it acquired a lien entitling it to priority, since the general creditor's judgment lien did not come into existence until a later date. *Wright v. Standard Engineering Corp.* (1972) 28 Cal.App.3d 244.

Delivery of Liquefied Petroleum Gas by Hose from Vendor's Tank Truck to Buyer's Storage Tank is Not Exempt Delivery of Gas through Mains, Lines, or Pipes

Plaintiff sought a refund for use tax that it had paid with respect to liquefied petroleum gas (LPG). The LPG had been transported by a vendor's tank truck to plaintiff's storage facility and had been delivered by passing it from the truck to plaintiff's container through the vendor's flexible high pressure tube or hose. Plaintiff based its claim on Section 6353 of the Revenue and Taxation Code, which exempts from tax the use of "gas, electricity, and water when delivered to consumers through mains, lines or pipes." Plaintiff claimed that LPG is a gas, even though delivered in liquid form, and that the delivery from the truck to the storage tank was through a main, line, or pipe.

The Board had long construed Section 6353 as not including within its exemption the sale or use of substances emptied from vendors' vehicles by means of hoses.

The court of appeal reversed the trial court judgment and upheld the Board's interpretation of the statute. The court held that the Board's construction was entitled to great weight and was not to be overturned unless clearly erroneous or unauthorized. Then, using dictionary definitions, the court found that mains, lines, and pipes did not ordinarily include hoses, and that a later amendment of the statute indicated that the Legislature in its use of the words "mains, lines, and pipes" meant fixed conduits such as those which ordinarily provide a particular geographical area with utility services.

Finally, noting that statutes granting exemptions from taxation must be reasonably, but strictly, construed against the taxpayer, the court found that the Board's construction was neither clearly erroneous nor unauthorized. The court distinguished a 1943 opinion of the Attorney General that held exempt the sale of gas through installations placed by a public utility on the premises of its customers on the basis that in that situation there were as many as 24 customers connected to each installation, the pipes were owned by the customers, the tanks and their contents were owned by the utility, there was continuous delivery of gas from the tank, and the flow was through the utility's meter into the customer's pipe and gas consumption devices. The court found it unnecessary to decide whether the LPG was a gas within the meaning of Section 6353. *Standard Oil Company of California v. State Board of Equalization* (1974) 39 Cal.App.3d 765.

Custom Packers are Consumers of Raw Materials Bought for Containers

Plaintiffs perform custom packing including the construction from raw material of containers around goods which require special preparation prior to shipment. Plaintiffs maintain inventories of lumber, nails, strapping material, and other types of container material which become components of the container. This container material was purchased without payment of sales tax after plaintiffs issued resale certificates to their various suppliers. Plaintiffs were not the sellers of any of the goods that were packaged and plaintiffs did not perform any of the subsequent shipment of goods. The packing and preparation was generally performed by plaintiffs at their various business locations. Thereafter, the contained goods would be delivered to a carrier for shipment pursuant to directions from plaintiffs' customers.

Items packaged for shipping included delicate instruments and machinery and computers, which were principally shipped in interstate or foreign commerce. The containers and packages were made for customers on an individual or job basis to hold specific goods. There was no understanding that the containers or packages would be returned to plaintiffs by plaintiffs' customers for reuse. Plaintiffs billed their customers a lump sum amount for packing and containing and did not make a "separate charge" for the container material. Although each transaction was based on an "express" contract agreement with the customer, there was no express provision for the passage of title to the container material in plaintiffs' billings, invoices, or other contract writings. Most of the purchase orders received by plaintiffs were verbal.

The Board assessed tax on plaintiffs' purchases of the materials on the ground that plaintiffs were not "selling" the containers to the customers but were instead providing a service of which the containers were an integral part.

Thus, the plaintiffs were consumers of the materials used in constructing the containers and could not purchase the materials for resale. The court of appeal held that plaintiffs did not meet the conditions required for effecting a retail sale of the containers but were instead the consumers of the materials. As such, tax applied to their purchases of the materials. *Sternoff v. State Board of Equalization* (1980) 103 Cal.App.3d 828.

Receiver Liable in Representative Capacity for Sales Tax Reimbursement Collected on Sales

The order of appointment of a receiver stated that he was authorized to conduct and operate the business, but that he would incur no personal risk for his operation of the business as receiver. After operating the business, the court discharged the receiver and ordered that he file a final account and report. The receiver reported sales tax and unemployment insurance tax to the appropriate agencies and set forth in his final account and report. However, although the receiver had collected sales tax reimbursement from customers on sales of tangible personal property and had made deductions from employees' paychecks under the provisions of the Unemployment Insurance Code, he did not pay the tax amounts to the appropriate state agencies. The State of California filed objections to the accounting and sought to prevent the discharge of the receiver, requesting a surcharge against the receiver for the tax amounts due. The trial court issued an order which approved, allowed, and settled the final account and report and exonerated the receiver's bond.

The California Court of Appeals reversed, holding that the State did not seek to hold the receiver personally liable, but sought to proceed against the bond for the receiver's failure to properly discharge his duties as receiver. The court held that a receiver who collects and withholds sales tax reimbursement and unemployment disability tax is liable in his representative capacity as a receiver for the payment of such funds on a priority basis in case of the insolvency of the receivership estate. *Stewart v. State of California* (1969) 272 Cal.App.2d 345.

Driving Trucks Out of State is Not a Taxable Use of Trucks in State

Taxpayer purchased trucks in California for lease to out-of-state carriers, and drove the unloaded trucks out of state, where the leases commenced. The Board imposed use tax on the purchases, and taxpayer filed suit for refund. The trial court entered judgment in favor of the taxpayer.

The court of appeal affirmed, holding that under Revenue and Taxation Code section 6009.1, no use tax can be imposed where the sole use of the property in the state is the delivery of the property to an out-of-state lessee. The Board's Regulation 1620(b)(5), which required that the property must be passively transported out of state, not transported under its own power, was an unwarranted abridgement of the exemption created in favor of taxpayers

who transport property outside the state for use thereafter solely outside the state. *Stockton Kenworth, Inc. v. State Board of Equalization* (1984) 157 Cal.App.3d 334.

Distributor of Greeting Cards Held to be the Retailer of Cards Sold through Agents

Plaintiff, a California corporation that distributed greeting cards to independent salesmen in California and other western states, sought a refund of taxes paid by it, contending that the salesmen were the actual retailers of the cards. The salesmen, who were solicited by an out-of-state corporation associated with plaintiff, forwarded orders to that corporation who in turn forwarded them to plaintiff. Plaintiff mailed the cards, which were drawn from stocks acquired from its out-of-state parent corporation, directly to the salesmen. The Board had ordered that plaintiff, rather than the salesmen, be regarded as the retailer of the cards pursuant to Revenue and Taxation Code Section 6015 which provides that the Board may, for the efficient administration of the Sales Tax Law, regard salesmen as agents of the distributors “. . . under whom they operate or from whom they obtain the tangible personal property sold by them . . .” and the distributors as retailers.

The trial court found that plaintiff distributed the cards to the salesmen, that the salesmen obtained the cards from plaintiff, and that the salesmen were so numerous that the Board could not effectively collect the tax directly from the salesmen. In affirming, the court of appeal held that plaintiff was not required to have an ownership interest in the cards to be a distributor. The fact that it was a subsidiary of the parent corporation and that the cards sent to the salesmen by plaintiff bore its identification in the form of a return address, and at times even contained sales literature inserted by it, was sufficient. The court noted that it was plaintiff which actually delivered the erecting cards to the salesmen, and that this act constituted the final service accorded to the salesmen by any of the entities. The court further held that plaintiff was not entitled to a refund with respect to sales which might have been made outside the state since it failed to offer any evidence as to which of its sales were made outside of California. *Sunshine Art Studios of California v. State Board of Equalization* (1974) 39 Cal.App.3d 223.

Board Records that Interpret Regulations are Considered Part of the Agency’s Working Law and are subject to the Public Records Act

A business providing advice to taxpayers on the construction and application of the Sales and Use Tax Law requested records from the Board relating to the Board’s interpretation of two tax regulations pursuant to the California Public Records Act (PRA). The business offered to pay fees for copying and for excising confidential taxpayer information from the requested records.

The court held that the request was sufficiently specific and that it sought the Board's "working law" which is a matter of public interest. The court stated that the Board could not restrict disclosure merely because the records contained confidential taxpayer information since such information could be excised without destroying the utility of the records. The fact that the records were sought for commercial use was irrelevant, since the PRA does not differentiate among those who seek access to public information. The court also stated that it was not an abuse of discretion to require the Board's preparation of a document list to assist the taxpayer in identifying the records it wished to obtain. *State Board of Equalization v. Superior Court (Associated Sales Tax Consultants)* (1992) 10 Cal.App.4th 1177.

California Constitution Bars Taxpayer Action for Refund Before Full Payment

After the Board sent taxpayer a notice of determination of sales taxes and interest due of \$187,000 for several different quarters, taxpayer sent the Board \$250 and instructed the Board to apportion the partial payment to all of the transactions the Board claimed were taxable. Taxpayer later filed an action for refund of the \$250 in Superior Court, while the taxpayer's petition for redetermination of the balance of \$187,000 liability was still pending before the Board. After the trial court overruled the Board's demurrer and denied the motion to strike the complaint, the Board sought a writ of mandate.

The California Supreme Court granted the Board's petition for a writ of mandate. The court held that Article XIII, Section 32 of the California Constitution, which prohibits actions to prevent or enjoin the collection of any tax, barred an action for refund of a partial payment before the full amount of the disputed tax was paid. This action would require adjudication of the taxpayer's liability for each disputed quarter, since the doctrine of res judicata would bar any subsequent Board action to collect additional taxes, even though almost all the assessed taxes remain unpaid. Article XIII, Section 32 forbids this result. The court disapproved two earlier cases, *Snoozie Shavings, Inc. v. State Board of Equalization* (1979) 97 Cal.App.3d 771 and *Schaffer v. State Board of Equalization* (1952) 109 Cal.App.2d 574, to the extent they are inconsistent with this decision. *State Board of Equalization v. Superior Court (O'Hara & Kendall Aviation, Inc.)* (1985) 39 Cal.3d 633.

A Purchaser Cannot Sue the Board for Refund of Sales Tax

A purchaser brought an action against the State Board of Equalization seeking the recovery of sales tax reimbursement which it assertedly overpaid to its vendors who, in turn, overpaid the Board. The Board successfully moved for summary judgment on the ground that the purchaser was not the taxpayer and thus lacked standing to sue for refund of sales tax. On granting summary judgment, the trial court granted the purchaser leave to file an

amended cross-complaint to bring itself within the rule of *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790, which provides a limited exception to the general rule prohibiting suits for tax reimbursement by anyone other than the taxpayer. The Board applied for extraordinary relief, challenging as an abuse of discretion the trial court's order denying its motion to strike the amended complaint and overruling its demurrer thereto.

The court of appeal issued a writ of mandate directing the trial court to vacate its order and to enter an order granting the relief sought. The court held that, because the purchaser did not lack a remedy, the exception to the general rule was inapplicable.

The court further held that the amended complaint expressly alleged that several of the purchaser's vendors had pending administrative refund proceedings against the Board, and in the event the vendors were successful in those proceedings, any refund so obtained would be reachable by the purchaser. The court also held it was clear from the allegations in the purchaser's complaint that existing administrative remedies had not been exhausted, and that pending completion of those administrative proceedings, the trial court lacked jurisdiction. *State Board of Equalization v. Superior Court (Petroleum Contractors, Inc.)* (1980) 111 Cal.App.3d 568.

Employers' Subsidies to Cafeteria Operators Not Subject to Tax

Plaintiff operated cafeterias on the premises of public and private employers. Plaintiff entered into management operating agreements with the employers whereby each employer guaranteed expenses plus a fixed or a percentage fee to plaintiff for operating the cafeteria. If sales exceeded the cost plus fee, plaintiff paid the excess to the employer.

The Board assessed and collected taxes on the additional amounts paid by employers to plaintiff on the basis that these constituted gross receipts from the cafeteria sales. Plaintiff's claim for refund of taxes paid on the subsidies was granted in the trial court and upheld in the court of appeal.

Since the Board's finding that the subsidies were a part of taxable gross receipts was not based on any formal regulation, the court held that the weight normally attached to Board findings did not apply and that this finding was subject to judicial review for errors in factual analysis and legal interpretation.

The court then found that the subsidies were not consideration for the food sold to employers nor a part of the gross receipts from the sale of meals. The subsidies were thus not subject to tax where they could not be traced to particular sales of particular meals. Rebates paid by plaintiff to the employers were, however, a part of plaintiff's taxable gross receipts. *Szabo Food Service, Inc. of California v. State Board of Equalization* (1975) 46 Cal.App.3d 268.

T

Amnesty Program Allowed Taxpayers to Make the Same Elections that were Available to Timely Filers

The Tax Penalty Amnesty Program (Revenue and Taxation Code Section 7070 et seq.) was set up to give delinquent taxpayers a time period within which to square their accounts. It was enacted to expand the tax rolls and revenues with a minimum investment of time and trouble. Taxpayer took advantage of the program by filing a sales and use tax return on tangible personal property that the taxpayer had acquired to lease to others. Taxpayer elected to pay the entire tax based on the purchase price that he initially paid for the property. The Board denied the election as being untimely and assessed tax on the rental amount as continuing sales subject to use tax.

The court of appeal held that the taxpayer was entitled to make the untimely election. The amnesty program was a “collective pardon.” To make the program effective, the disincentives that keep many taxpayers from making their tax payments needed to be removed. One disincentive would be the loss of the right to make the election provided for in Regulation 1660: to pay tax on the purchase price of the leased tangible personal property or upon the rental receipts. By enacting the amnesty program, the Legislature surrendered all sanctions except the payment of principal and the running of interest. A remedial statute such as this should be construed to advance and extend the remedy to bring within its scope every case which comes within its spirit and policy. *Tetra Pak, Inc. v. State Board of Equalization* (1991) 234 Cal.App.3d 1751.

Pumping Charges Should be Included in the Measure of Tax

Plaintiff was engaged in the business of manufacturing and selling ready-mix concrete under one company name and providing pumping services for placing concrete in areas difficult to reach under another company name. Its customers could buy the concrete separately, engage only the pumping services, or could order both the concrete and the placement thereof. The sale of the concrete and pumping services was a single transaction using two invoices.

No written agreement existed between the plaintiff and the customer, and no explicit agreement existed between them as to when title to the concrete passes to the customer. During the course of an audit by the Board, it was concluded that tax for pumping services had been improperly excluded from the measure of sales tax. Following a hearing with the Board, plaintiff paid the tax and filed a claim for refund which was denied. The court concluded that the plaintiff’s pumping operation was a transportation function which occurred before the sale of the concrete was completed and, therefore, the pumping charges should properly have been included in the measure of tax. *Tobi Transport, Inc. v. State Board of Equalization* (1980) 104 Cal.App.3d 730.

Existing Library of Custom Computer Programs is Taxable when Sold

Plaintiff, the liquidation agent for taxpayer, sold all the assets of taxpayer's engineering services division to a purchaser. Part of the assets consisted of a library of custom computer programs. Taxpayer also made numerous sales of the assets of its other divisions to other purchasers. Plaintiff contended that the sale of the software library was a nontaxable sale of custom programs, and that the sale of the engineering services division's assets was an exempt occasional sale.

The court of appeal held in favor of the Board, stating that since the computer programs were not developed to the special order of the purchaser, their sale could not be characterized as a service excluded from tax under Revenue and Taxation Code Section 6010.9. The court also held that all of the taxpayer's sales, not just sales by one division, must be considered in determining whether the sale of that division's assets was an exempt occasional sale, and therefore the sale of the engineering services division was taxable. *Touche Ross & Co. v. State Board of Equalization* (1988) 203 Cal.App.3d 1057.

U

Petroleum Coke Sales Exempt from Taxation as "Waste By-Products"

Taxpayer refined crude oil into finished petroleum products, and sold petroleum coke as a solid by-product of the refining processes. The coke taxpayer produced was classified as fuel-grade petroleum coke, and taxpayer sold it to a customer who used the coke as a fuel in its chemical manufacturing facility. Taxpayer sued the Board for a refund of sales tax imposed on the sale of the petroleum coke.

The court of appeal agreed with the taxpayer that the petroleum coke was a waste by-product within the meaning of Revenue and Taxation Code Section 6358.1 and, therefore, exempt from sales and use tax. The court found that the petroleum coke was an undesirable fuel source and that its commercial value was minimal. *Union Oil Co. v. State Board of Equalization* (1990) 224 Cal.App.3d 665.

The United States was Not Entitled to Recovery of Funds it had Paid to a Construction Contractor as Reimbursement for the Contractor's Tax Liability Arising on a United States Construction Contract

The Departments of the Navy and Energy contracted with WBEC to manage oil drilling operations on federal land in California. In notices issued to WBEC in July 1978 and December 1982, the Board determined that WBEC owed approximately \$14 million in sales and use taxes under Revenue and Taxation Code section 6384, which imposes tax on sales to contractors of tangible personal property for use in certain construction contracts with the United States.

WBEC paid the taxes using funds the Federal Government provided. After exhausting its administrative remedies with the Board, WBEC filed a timely suit for refund. In January 1988, the Board and WBEC stipulated to a \$3 million refund for erroneous assessments and to a dismissal of the case.

In May 1988 the United States filed suit in the Eastern District of California seeking a declaratory judgment that California had classified and taxed WBEC erroneously under California law, and that the taxed property was exempt. In the course of the suit the United States also contended that it was entitled to recovery based on the federal common-law cause of action for money had and received. The District Court rejected all of its arguments.

The Supreme Court reaffirmed its prior holding that the Government is not immune from taxes merely because they have an “effect” on the Government or “even because the Federal Government shoulders the entire economic burden of the levy.” In this case, California did not tax the Federal Government; it taxed WBEC.

The court also held that the Government was in no better position than as a subrogee of WBEC. Since WBEC’s rights had lapsed and its claims were barred, under traditional subrogation principles, the claims of the United States were also barred. Finally, the court rejected the Government’s argument that state statutes of limitation do not bind it. *United States v. California* (1993) 507 U.S. 746; 123 L.Ed.2d 528.

Sales Tax Unconstitutional when Imposed on Leases to United States

The Board imposed sales tax on lessors for leases of equipment to the United States beginning January 1, 1979, under applicable law which provides that the sales tax applies when the lessee under a lease is exempt from the use tax.

The United States sought declaratory and injunctive relief, and a refund of sales taxes paid by its lessors to the Board. The U.S. District Court entered judgment in favor of the United States. The U.S. Court of Appeals, Ninth Circuit, affirmed, holding that the legal incidence, not just the economic burden, of the sales tax is placed on the United States and therefore violates the United States’ constitutional immunity from state taxation.

Even though the sales tax is paid by the lessors, not the United States, under these leases, and even though Civil Code section 1656.1 is facially neutral because it provides that whether the buyer reimburses the seller for the sales tax depends on the agreement of the parties, the California sales tax scheme provides a strong economic incentive (and manifests a legislative intent) for the lessors to collect the sales tax from the United States. This is because the lessor must pay more to the state in taxes if he absorbs the tax himself and passes the economic burden on as an increase in price, than if he collects the tax from the United States. *United States v. California State Board of Equalization* (9th Cir. 1981) 650 F.2d 1127, *affd.*, 456 U.S. 901 (1982).

Taxes Imposed on United States Contractors are Valid; Legal Incidence of Tax did Not Fall on United States

The Board collected use taxes from lessors who leased personal property to United States contractors, and the United States reimbursed the contractors for the taxes. The United States sought to recover the taxes paid. The U.S. District Court entered judgment in favor of the United States.

The U.S. Court of Appeals, Ninth Circuit, reversed and held in favor of the Board. Even though the contractors were acting as designated agents of the United States in executing the leases, and even though the United States bears the economic burden of the tax, the tax is valid if the legal incidence of the tax is not imposed on the United States itself.

Here the legal incidence of the tax falls on the contractors, who are not performing governmental functions, but rather are engaged in commerce for their own economic advantage. *United States v. California State Board of Equalization* (9th Cir. 1982) 683 F.2d 316.

Leases to the United States Not Subject to Sales Tax

Plaintiff contended that the application of sales tax to rental receipts of lessors of tangible personal property to the United States was actually a tax on the United States, and that such tax violated the constitutional immunity of the United States from state taxation. The Ninth Circuit Court of Appeals relied on the U.S. Supreme Court decision in *Diamond National Corp. v. State Board of Equalization* (1976) 425 U.S. 268; 47 L.Ed.2d 780, in finding that the incidence of the tax was on the United States as the lessee and was thus constitutionally barred. *United States v. State Board of Equalization* (9th Cir. 1976) 536 F.2d 294.

California Sales Tax Properly Imposed on Sales to National Banks

The United States and a national banking association challenged the imposition of California state and local sales taxes on sales of tangible personal property to national banks during the December 24, 1969 to December 31, 1972 bridge period covered by the 1969 temporary amendment to the federal statute governing taxation of national banks. At trial, summary judgment was granted the Board, and plaintiffs appealed.

The Ninth Circuit Court of Appeals held that California's sales tax on sales of tangible personal property to national banks was a tax imposed by a state which did not impose a tax or an increased rate of tax in lieu thereof within the meaning of P.L. 91-156, nor was the built-up rate of California's franchise tax on national banks imposed in lieu of the sales tax on sales of tangible personal property to a national bank. Thus, automatic imposition of the sales tax during the bridge period could not possibly result in unintended double taxation of national banks in violation of the amendment. *United States v. State Board of Equalization* (9th Cir. 1980) 639 F.2d 458.

Suit Against Surety for Tax Not Barred by Statute of Limitations where Certificate of Tax Lien is Filed Timely

Defendant, surety for a delinquent taxpayer, contended that the Board's action to collect taxes through enforcement of the contract of surety was barred because suit was brought more than three years after the cause of action arose, i.e., the date the determination of tax became final. The court upheld the Board, holding that although Section 6711 of the Revenue and Taxation Code as it read at the time the cause of action arose provided for a limitation on the bringing of action of three years after the recording of a certificate of tax lien, the Legislature amended this section to permit the Board to bring an action within the ten-year period that a tax lien is in force. This change took effect before the cause of action was barred under the earlier version of the statute. Since the statute of limitations affects only the remedy and not the right, the period may be extended by the Legislature if it does so before the cause of action is barred. The Board's action was brought within the limitations of the statute as amended, and was timely.

The court stated that it was unnecessary to decide the Board's contention that the applicable statute was Section 337, subdivision 1 of the Code of Civil Procedure, which provides that an action founded upon a contract, obligation, or liability founded upon an instrument in writing must be brought within four years. However, in considering defendant surety's contention that a three-year period of limitation specified in Section 338 of the Code of Civil Procedure applied, the court pointed out that Section 6711 prescribes a different limitation period for actions to collect taxes. *People v. United States Fire Insurance Co.* (1976) 61 Cal.App.3d 231.

Sale of Cranes in Place was a Sale of Tangible Property, Not an Improvement to Real Property

Taxpayer erected two cranes on land belonging to the Port of Oakland. After the cranes were erected, taxpayer sold the cranes to the port, and leased the cranes back from the port together with the land on which the cranes had been erected for \$1 per year. Taxpayer and the port stipulated by contract that the actual purchase price of the cranes was \$3.68 million, but the port did not pay any cash for the cranes. Instead, taxpayer agreed that it had received valuable consideration for the sale of the cranes in the leaseback arrangement plus related agreements. Taxpayer contended the sale of the cranes was a sale of real property fixtures, not subject to sales tax. The trial court granted summary judgment in favor of the Board.

The court of appeal affirmed. The court held that the cranes were tangible personal property in the hands of the taxpayer, even though after the transfer the cranes became real property fixtures annexed to the port's property. Thus,

the sale of the cranes to the port was a taxable transfer of tangible personal property. The court also held that since the taxpayer acknowledged receipt of valuable consideration in lieu of cash under the crane leaseback and other related agreements, the Board was correct in assessing tax based on the actual purchase price stated under the terms of the crane purchase agreement. *United States Lines, Inc. v. State Board of Equalization* (1986) 182 Cal.App.3d 529.

V

Federal Courts have No Jurisdiction to Enjoin Collection of a State Tax

Taxpayer filed a complaint for declaratory and injunctive relief against the State Board of Equalization alleging that the assessment of use taxes on automobiles that it leased to the federal government violated federal immunity, was arbitrary and discriminatory, and was a result of an erroneous construction of the tax law. The District Court dismissed for want of jurisdiction.

On appeal, the District Court's dismissal was upheld on the basis that the suit was barred by the Eleventh Amendment. *V.O. Motors v. State Board of Equalization* (9th Cir. 1982) 691 F.2d 871.

W

Wholesaler Did Not Resell Marketing Aids Under Board Regulation

Taxpayer, a wholesaler who sold merchandise to retailers, provided free cardboard display racks for its merchandise to the retailers as marketing aids. Taxpayer had purchased the display racks under resale certificates. The Board assessed use tax against taxpayer on its purchase price of the display racks based on Regulation 1670(c), which provides that a marketing aid will be considered resold only if the supplier obtains reimbursement for the marketing aid of 50 percent or more of its purchase price; otherwise, under the regulation the supplier is the consumer of the marketing aid.

The California Supreme Court held that the Board's regulation was not arbitrary, and that taxpayer did not satisfy the regulation's requirement of proving that a sale occurred. Accordingly, the court upheld the use tax on taxpayer's purchases of the display racks. *Wallace Berrie & Co. v. State Board of Equalization* (1985) 40 Cal.3d 60.

Contractor is Consumer of Materials when He is Contractually Responsible and Provides All Supervision in Installation

Plaintiff entered into lump-sum contracts under which it furnished shop drawings, post-tensioning tendons, rental of stressing equipment, and field supervision. Under some of the contracts, plaintiff supervised the post-tensioning work which was performed by the general contractor or a

subcontractor of the general contractor. Under other contracts, the post-tensioning work was done by plaintiff or a subcontractor of plaintiff. In either case plaintiff was responsible for its work, materials, and equipment. Where the post-tensioning work was performed directly by plaintiff or a subcontractor of plaintiff, it was agreed that under Regulation 1521, regarding construction contractors, plaintiff was the consumer of the materials used. Where the post-tensioning work was done under plaintiff's supervision by the general contractor or a subcontractor, the Board contended that plaintiff was the retailer of goods to the general contractor, and asserted sales tax. Plaintiff paid the tax and sued for refund.

The court of appeal upheld the trial court in granting the refund to the plaintiff. The court based its decision on what it found to be the scope of plaintiff's responsibilities under the contracts, which included all supervision and testing, the making of necessary corrections when there was a failure, and the fact that all employees involved, regardless of employer, labored under the expert direction of plaintiff's representative. *Western Concrete Structures, Inc. v. State Board of Equalization* (1977) 66 Cal.App.3d 543.

No Exemption for Equipment and Supplies Used in Construction Contract Entered into for Fixed Price Prior to August 1, 1967

Plaintiff was awarded a lump-sum fixed price contract with the State Department of Water Resources for the construction of a dam. Subsequently, the state legislature increased the sales and use tax rate by 1 percent, effective August 1, 1967, and also added Section 6376 to the law, providing an exemption from the increase for the sale and use of materials and fixtures obligated pursuant to an engineering construction contract entered into for a fixed price prior to the effective date of the rate increase. The Board took the position that the exemption was applicable only to "materials" and "fixtures" as those terms had previously been defined in the Board's Ruling 11 "Construction Contractors." This interpretation excluded from the exemption other tangible personal property such as construction equipment and supplies.

Plaintiff sought declaratory relief that the Section 6376 exemption covered equipment and supplies, and sought other alternative relief against the state as a party to the contract. Plaintiff subsequently paid approximately \$102,000 in additional taxes, unsuccessfully sought a refund from the Board, and filed a suite for refund. In the consolidated actions, the trial court found that Section 6376 did not exempt the transactions in dispute and denied plaintiff relief against the state as a party to the contract.

In affirming the judgment of the lower court denying plaintiff's claim for refund of tax, the court of appeal held that the words "materials and fixtures" did not include construction equipment and supplies. The court found that it was reasonable to assume that the Legislature used the words "materials and

fixtures” advisedly and in the sense which had been given them by long-standing administrative ruling and by judicial decision. Even without reference to the administrative ruling, the court observed, by no stretch of the imagination could construction equipment and supplies be considered either “fixtures” or “materials.” Further, both the language of Section 6376 and the post-enactment history of the section strongly supported the interpretation urged by the Board. The court further held that the construction contract did not provide for additional compensation on account of the increased tax burden, and that plaintiff was not subject to any unconstitutional impairment of its contract with the Department of Water Resources as a result of any additional burden falling on it by virtue of the increased tax. *Western Contracting Corp. v. State Board of Equalization* (1974) 39 Cal.App.3d 341.

Lien Attaches to Equitable Interest in Real Property of Taxpayer

Plaintiff acquired her co-tenant’s interest in real property through a quitclaim deed and sued to quiet title. The Board had previously filed a lien for unpaid sales and use taxes against the co-tenant under Section 6757 of the Revenue and Taxation Code. That section states that the amount required to be paid, together with interest and penalty, constitutes a lien upon all property in the county owned by the person. At the time the lien was filed, the plaintiff and cotenant had entered into a contract with the Department of Veterans Affairs for the purchase of the real property in question, so they owned an equitable interest in the property. The legal question was whether or not such a lien attaches to an equitable interest. The court of appeal affirmed the trial court’s finding that such a lien does attach to an equitable interest. When Section 6757 was amended in 1965 by deleting the word “real” as a modifier of the property to which the lien attached, the Legislature intended to broaden the scope of the lien to “all property.” Since it is clear that an equitable interest is property, the lien under Section 6757 embraces it. *Wilkinson v. Wilkinson* (1976) 51 Cal.App.3d 382.

Corporate Officer Liability

The chief financial officer of a corporation willingly failed to pay sales taxes during the period at issue. After that period, he resigned, and more than a year later the corporation dissolved. The Board issued an assessment to the former chief financial officer for corporate officer liability under Revenue and Taxation Code section 6829. He argued that, since he was not a corporate officer at the time the corporation dissolved, he was not liable under section 6829 because it used the present tense. The court noted that Revenue and Taxation Code section 11 provides that in construing the Revenue and Taxation Code, the present tense includes the past and future tenses. Accordingly, the court concluded that the former chief financial officer was liable for the corporation’s tax debt during the period he willingly failed to pay that tax as a responsible corporate officer. *State Board of Equalization v. Wirick* (2001) 93 Cal.App.4th _____.

Fraudulent Transfer

The Board notified the spouse of a taxpayer who owed sales taxes that it would seek an earnings withholding order against her to pay her husband's tax debt. Thereafter, taxpayer and his spouse entered into an agreement transmuting their future earnings from community property to separate property. The spouse thereafter became employed by Wells Fargo for an annual salary of about \$500,000. The Board filed an application for an earnings withholding order arguing that the agreement did not bar garnishment because it was fraudulent and unenforceable under Family Code section 851 and Civil Code section 3439.04. The spouse argued that the agreement was not a fraudulent transfer because she was not employed by Wells Fargo when the agreement was executed and that her future earnings were a mere expectancy that could not be transferred. The court held that the taxpayer had a present interest in the future earnings of his spouse at the time the agreement was executed, and the spouse's attempt to transmute that interest to avoid the tax debt constituted a fraudulent transfer. *State Board of Equalization v. Woo* (2000) 82 Cal.App.4th 481.

Use Tax on Vehicles Originally Sold Outside California

In 1976 a California resident purchased an antique vehicle from a private party in North Carolina. When the taxpayer attempted to register the vehicle with the Department of Motor Vehicles, he was required to pay a vehicle license fee and use tax that were higher than the amounts he would have paid had he purchased the vehicle in California. Although the license fee and use tax charges were imposed at uniform rates, the tax base for certain out-of-state purchases of vehicles was calculated differently from the tax base for in-state purchases. As a result, the license fee and use tax were generally higher on out-of-state purchases. The plaintiff filed a class claim and a class action for a refund of the fees and use tax.

1436.2
2002-1

SALES AND USE TAX COURT DECISIONS

The California Supreme Court held that the state had discriminated against interstate commerce by imposing higher license fees on vehicles purchased out of state and by imposing higher use taxes on vehicles purchased from private parties in other states. Such discrimination was not justified by administrative convenience.

The court further held that the failure of the Board to comply with the Administrative Procedures Act did not exempt taxpayers from the obligation to pay taxes as required by state law and could not deprive the state of the tax revenues to which it was entitled. Thus, no refunds were due for use tax arising from private-party transactions after the Board has discontinued its discriminatory practice with respect to such transactions.

Finally, the court held that class claims were not authorized by the legislature during the periods in issue; therefore, all persons who had not filed a timely valid claim for refund should be deleted from the class in this lawsuit. *Woosley v. State of California* (1992) 3 Cal.4th 758.

X

Y

Although Board Annotations are entitled to Some Consideration by Courts, they are not Regulations and are not Entitled to the Same Deference

Plaintiff was a seller of musical instruments, and it made gifts of some instruments by removing them from California inventory and delivering them to common carriers for shipment to donors throughout the county. The Board issued a determination for use tax based on the cost of the instruments based on the conclusion that plaintiff had used the instruments in California when making gifts of them in this state. The trial court held in favor of plaintiff. The Court of Appeal reversed, holding in favor of the Board, based on annotations of legal opinions for the Board's legal staff. The determination of the Board had been consistent with these annotations, some of which were over 30 years old.

The Supreme Court reversed and remanded the matter for further consideration by the Court of Appeal. The Supreme Court held that the lower court had placed too much weight on the Board's annotations. The Court held that the Board's annotations are entitled to some consideration by a court upon review of a claim for refund, but that the annotations are not entitled to the same deference as a regulation. Rather, the court held that the weight of an annotation in a particular case depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade,

if lacking power to control. The court directed the Court of Appeal to again consider the merits of plaintiff's claim in light of the clarification given as to the proper weight to be given to the Board's annotations. *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1.

Gifts Sent Outside California

Upon remand by the California Supreme Court (see above), the Court of Appeal applied the instructions of the Supreme Court. Relying on the annotations and, alternatively, on its own analysis, the court concluded that a gift occurs, and California use tax applies, when property is delivered to a common carrier in California for shipment to a donee. This is true whether the donee is inside or outside California because the gift is completed for sales and use tax purposes in California at the time the donor delivers the property to the common carrier for shipment to the donee. *Yamaha Corp. of America v. State Board of Equalization* (1999) 73 Cal.App.4th 338.

Z